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No. 01-679

IN THE

# Supreme Court of the United States

GONZAGA UNIVERSITY AND ROBERTA S. LEAGUE,
*Petitioners,*

v.

JOHN DOE,
*Respondent.*

**On Writ of Certiorari to the Supreme Court of the State of Washington**

## BRIEF FOR PETITIONERS

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## QUESTION PRESENTED

May a student sue a private university for damages under 42 U.S.C. § 1983 to enforce provisions of the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g, which disqualify from federal funding educational institutions that have a policy or practice of permitting education records to be released to unauthorized persons?

## PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioners Gonzaga University and Roberta S. League were defendants in the trial court, appellants and cross-appeal respondents in the Court of Appeals, and respondents in the Washington Supreme Court. Respondent John Doe was the plaintiff in the trial court, respondent and cross-appellant in the Court of Appeals, and petitioner in the Washington Supreme Court. Susan Kyle and Julia Lynch were defendants in the trial court, appellants and cross-appeal respondents in the Court of Appeals, and respondents in the Washington Supreme Court. Judgment was entered against them only with respect to state law claims. Petitioner Gonzaga University is a Washington non-profit corporation with no stock issued. Petitioners are collectively referred to herein as "Gonzaga."

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**On Writ of Certiorari to the Supreme Court of the State of Washington**

## BRIEF FOR PETITIONERS

## OPINIONS BELOW

The opinion of the Supreme Court of the State of Washington is reported at 24 P.3d 390, and reproduced in the appendix to the petition for certiorari ("Pet. App.") at 1a. The order of the Supreme Court of the State of Washington denying reconsideration is unreported, and reproduced at Pet. App. 29a. The opinion of the Court of Appeals of the State of Washington is reported at 992 P.2d 545, and reproduced at Pet. App. 30a.

## JURISDICTION

The judgment of the Washington Supreme Court was entered on May 31, 2001. Pet. App. 1a. On August 10, 2001, the Washington Supreme Court denied Gonzaga's timely

motion for reconsideration. Pet. App. 29a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a). The petition for certiorari was filed on November 5, 2001, and granted on January 11, 2002. 122 S. Ct. 865.

## STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 1983 of Title 42 of the United States Code; the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g ("FERPA"); 20 U.S.C. § 1234c; the United States Department of Education regulations issued under FERPA, 34 C.F.R. Part 99; and pertinent provisions of Chapter 180-75 of the Washington Administrative Code (1997) are reprinted in the addendum hereto.

## INTRODUCTION

Respondent John Doe was awarded compensatory and punitive damages and attorneys' fees for Gonzaga's violations of the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g. FERPA, however, contains no express cause of action authorizing such a suit, and courts have uniformly held that no cause of action may be implied under the Act. Doe circumvented this hurdle by alleging state action and suing Gonzaga under 42 U.S.C. § 1983. This Court has held, however, that a § 1983 plaintiff "must assert the violation of a federal *right*, not merely a violation of federal *law*." *Blessing* v. *Freestone*, 520 U.S. 329, 340 (1997) (emphases in original). FERPA does not confer individual rights enforceable under § 1983, and Doe's claim accordingly should have been dismissed.

Rather than conferring individual rights, FERPA conditions the award of federal funds on recipients not having certain policies or practices. This systemic approach creates no individual entitlement enforceable under § 1983. The remedy for a violation of such funding conditions is a termination of federal financial assistance. Congress authorized the Secretary of Education to invoke that remedy only



after unsuccessful efforts by the Department to obtain voluntary compliance, 20 U.S.C. § 1232g(f), making clear that Congress did not contemplate exposing schools to financial jeopardy without the opportunity for voluntary compliance. Actions for compensatory and punitive damages under § 1983 are inconsistent with that intent. In addition, FERPA goes on to address specifically the question of individual complaints under the Act. It again looks to the Secretary—not private damages actions in court—for enforcement, providing that the Secretary shall establish one centralized office to hear and adjudicate such complaints.

Fundamental considerations of federalism, separation of powers, and administrative deference counsel caution in inferring that Congress intended, though it did not say so, to confer individual rights enforceable under § 1983 when it imposed conditions on recipients of federal funds. Indeed, this Court has held that Congress must "unambiguously" confer such rights before a condition may be enforced under § 1983. *Suter* v. *Artist M.*, 503 U.S. 347, 357, 363 (1992). The text, structure, and legislative history of FERPA contain no hint that Congress supposed that the systemic conditions it imposed on schools accepting federal funds were to be enforced by private parties through individual damages actions in court.

## STATEMENT OF THE CASE

**Statutory and Regulatory Background.** Congress enacted FERPA as part of the Education Amendments of 1974, which reauthorized and amended the Elementary and Secondary Education Act of 1965. FERPA conditions receipt of federal funds by "educational agencies or institutions" on the recipient not having certain policies or practices regarding access to and disclosure of students' education records. First, FERPA regulates *access* to such records, by providing that "[n]o funds shall be made available * * * to any educational agency or institution which has a policy of denying, or which

effectively prevents, * * * parents [or eligible students] * * * the right to inspect and review the education records of their children," 20 U.S.C. § 1232g(a)(1)(A), or fails to provide parents or eligible students an opportunity to challenge the content of such records and to have inaccurate or misleading information corrected or deleted. *Id.* § 1232g(a)(2). Second, FERPA regulates *disclosure* of education records, by providing that "[n]o funds shall be made available * * * to any educational agency or institution which has a policy or practice of permitting the release of education records" without written consent, subject to certain exceptions. *Id.* § 1232g(b)(1).

To enforce these conditions, FERPA requires the Secretary of Education to "take appropriate action to enforce this section and to deal with violations of this section." *Id.* § 1232g(f). Such action may include termination of federal assistance, but only upon a determination that "compliance cannot be secured by voluntary means." *Id.* The Secretary was further required to "establish or designate an office and review board within the Department for the purpose of investigating, processing, reviewing, and adjudicating violations of this section and complaints which may be filed concerning alleged violations of this section." *Id.* § 1232g(g).

FERPA specifies that all the Secretary's functions under the statute, except conducting hearings, must be carried out at headquarters, not in the Department's regional offices. *Id.* That requirement was added "[b]ecause of concern that regionalizing the enforcement of the law may lead to multiple interpretations of it, and possibly work a hardship on parents, students, and institutions * * *." Joint Statement in Explanation of Buckley/Pell Amendment, 120 Cong. Rec. 39,866 (1974).

To carry out his responsibilities under FERPA, the Secretary issued regulations designating the Family Policy Compliance Office ("FPCO") of the Department to "[i]nvestigate, process and review complaints under the Act" and designating the Office of Administrative Law Judges "to act as the Review Board required under the Act to enforce the Act with respect to all applicable programs." 34 C.F.R. § 99.60. The regulations set forth detailed, comprehensive procedures pursuant to which parents and eligible students file complaints with FPCO regarding violations of FERPA, *id.* §§ 99.63, 99.64, and FPCO investigates complaints, *id.* §§ 99.64, 99.65, makes findings and orders compliance, *id.* § 99.66, and enforces its decisions, *id.* § 99.67.



**Facts.** This § 1983 case arises out of a teacher-in-training's claim that Gonzaga (a private Jesuit university located in Spokane, Washington) violated his rights under FERPA because members of its faculty discussed with a state investigator another student's accusation that he sexually assaulted her. As the Washington Supreme Court acknowledged, in 1993 petitioner Roberta League, the certification specialist at Gonzaga's school of education, and Dr. Susan Kyle, director of field experience for student teachers at Gonzaga, heard reports from student Julia Lynch that respondent John Doe[1]—a school of education student—sexually assaulted fellow student Jane Doe. Pet. App. 2a-3a. When Kyle approached her, Jane Doe refused to make a formal statement about the allegations and would not comment on her relationship with John Doe, stating, according to Kyle, "I promised [John Doe] I wouldn't tell. He made me promise." Pet. App. 5a, 33a.

Washington State Board of Education regulations then in effect governed the teacher certification process. They required that a designated official of an applicant's school

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[1] Although respondent's identity was made public during proceedings below, we follow the Washington Supreme Court in referring to him as John Doe and to the student he allegedly assaulted as Jane Doe. *See* Pet. App. 2a.

consult faculty members who knew the applicant, and swear that the school official and consulted faculty members had "no knowledge that the applicant has been convicted of any crime and ha[d] no knowledge that the applicant has a history of any serious behavioral problems." Wash. Admin. Code 180-75-082(3) (1997) (repealed effective Mar. 8, 1997).[2]

Concerned about whether Gonzaga would be able to submit an affidavit supporting John Doe's application for teacher certification, League discussed the matter with Adelle Nore, a senior investigator with the Office of the Superintendent of Public Instruction (OSPI), the state agency that regulates teacher education programs in Washington. Other Gonzaga personnel also contacted Nore concerning the allegations against John Doe. During one contact, League gave Nore John Doe's name.

Respondent's state law claims were based on Gonzaga's internal documentation of the sexual misconduct allegations, and on the facts reported to OSPI. His FERPA claim is premised on disclosure to OSPI of his name and the reported allegations.

Pursuant to the pertinent state board of education regulation, the Gonzaga school of education dean, Dr. Corinne McGuigan, eventually concluded that sufficient evidence of a serious behavior problem precluded her from signing the affidavit in support of John Doe's application for teacher certification. Gonzaga never provided OSPI an affidavit regarding John Doe.

**Proceedings Below.** John Doe sued Jane Doe for defamation and Gonzaga for defamation, negligence, and breach of

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[2] The provision that replaced section 180-75-082 of the Washington Administrative Code similarly requires a teacher certification applicant's school of education to submit an affidavit attesting to "the applicant's character or fitness." Wash. Admin. Code 180-79A-155(3).



educational contract. John Doe later added the other individual defendants as well as a state law claim for invasion of privacy and a § 1983 claim that alleged violation of FERPA arising out of the release of his name to OSPI.

At trial, Gonzaga moved for judgment as a matter of law on the FERPA claim. Gonzaga argued that FERPA creates no right or privilege under § 1983 and that Gonzaga's challenged conduct was not in any event under color of state law. The trial court denied the motion.

A jury returned a verdict for John Doe on all five theories of recovery and awarded him a total of $1,155,000 in damages. On the FERPA claim, the jury awarded $150,000 in compensatory and $300,000 in punitive damages against Gonzaga and League. The trial court entered judgment on the verdict and awarded John Doe attorneys' fees and costs pursuant to his § 1983 claim. Superior Ct. Dkt. No. 164 at 3-4, 170 at 2, 4.

Gonzaga appealed the denial of its motions and the judgment. On appeal Gonzaga argued, among other things, that FERPA may not be enforced under § 1983 and that its challenged conduct was not under color of state law.

The Washington Court of Appeals reversed the judgment on all five of John Doe's claims, including the FERPA claim. Pet. App. 53a. The Court of Appeals held that "FERPA does not create individual rights privately enforceable under 42 U.S.C. § 1983." Pet. App. 47a. FERPA, the court noted, provides that federal funds be unavailable to an education institution that "has a policy or practice of permitting the release of education records" without consent. *Id.* (quoting 20 U.S.C. § 1232g(b)). "Like the federal law at issue in [*Blessing* v. *Freestone*]," the court concluded, FERPA requires that schools "have in place a *systemwide* plan; the law is not intended to ensure that 'the needs of any particular person have been satisfied.' " *Id.* (quoting *Blessing*, 520 U.S. at 343).

The Washington Supreme Court granted John Doe's petition for review. That court addressed the question "[w]hether FERPA creates any right or privilege which can be enforced by individuals under 42 U.S.C. sec. 1983." Pet. App. 11a. Gonzaga contended that this Court's decision in *Suter* v. *Artist M.* made clear that the overriding question in deciding whether a Spending Clause statute creates rights enforceable under § 1983 is whether the statutory language "unambiguously confer[s] an enforceable right upon the Act's beneficiaries * * *." 503 U.S. at 363; *see id.* at 357 (same). The Washington Supreme Court, however, failed to apply the *Suter* analysis; indeed, the court's only citation to *Suter* came in a footnote that implicitly criticized the Washington Court of Appeals for relying on that decision. Pet. App. 20a n.11.

Purporting to analyze the § 1983 enforceability question under the "three-factor test" this Court applied in *Blessing*, the Washington Supreme Court asked "(1) whether Congress intended the provision in question to benefit the plaintiff; (2) whether the right protected by the statute is so 'vague and amorphous' that its enforcement would strain judicial competence; and (3) whether the statute imposes a binding obligation on the states." Pet. App. 19a-20a. The court found that FERPA "is intended to benefit students"; that "the right is not so 'vague and amorphous' that the court cannot enforce it"; and that "the FERPA provision provides a binding obligation." Pet. App. 20a. Although the court acknowledged that "FERPA itself does not give rise to a private cause of action," Pet. App. 19a, it nonetheless held that "the FERPA provision at issue here gives rise to a federal right enforceable under section 1983." Pet. App. 20a.

The court reversed the Court of Appeals and remanded with instructions to reinstate the judgment on all of John Doe's claims—including compensatory and punitive damages and attorneys' fees on the FERPA claim—except the negligence claim, which, it held, should be dismissed. Pet. App. 28a. Gonzaga's timely motion for reconsideration was



denied. Pet. App. 29a.[3] Gonzaga petitioned for certiorari, raising two questions: (1) whether a student may sue a private university for damages under § 1983 to enforce FERPA, and (2) whether a private university acts "under color of state law" when it provides information to a state official in connection with state law requirements. This Court granted certiorari, limited to the first question. 122 S. Ct. 865.

## SUMMARY OF ARGUMENT

Congress provided no express cause of action in FERPA, and courts have consistently held that there is no implied right of action under the Act. The question presented is whether Congress nonetheless "unambiguously" expressed the intent in FERPA to confer individual rights enforceable in private damages actions under 42 U.S.C. § 1983. *Suter*, 503 U.S. at 357, 363. That rigorous standard, which must be met before conditions in Spending Clause legislation will be held to give rise to § 1983 rights, reflects the profound federalism, separation of powers, and administrative deference principles implicated by a judicial decision to find such a cause of action when Congress has not legislated one expressly, but has instead—as in FERPA—provided a different remedial regime, one that vests remedial authority in an expert agency rather than federal courts.

FERPA does not confer rights enforceable under § 1983. Respondent Doe relies upon FERPA's disclosure provisions, but those provisions are not phrased in terms of individual rights. They instead condition the receipt of federal funds on schools not having certain policies or practices. *See* 20 U.S.C. § 1232g(b). Congress sought to achieve its goals in FERPA not by empowering parents and students to sue for

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[3] The Washington Supreme Court stayed the judgment on the FERPA claim pending the petition for certiorari and subsequent proceedings in this Court. Petitioners have satisfied the judgment with respect to the non-FERPA claims.

damages, but by requiring funding recipients to act in a certain manner.

This conclusion is confirmed by the remedies Congress chose to provide in FERPA. Congress gave the Secretary of Education the responsibility to "take appropriate actions to enforce [FERPA] and to deal with violations of [FERPA]," and gave him the authority to do so by withholding funds, issuing cease and desist orders, entering into compliance agreements, and taking "any other action authorized by law." 20 U.S.C. §§ 1232g(f), 1234c(a). Funds may be terminated, however, only if the Government's efforts to achieve voluntary compliance are fruitless and the failure to comply is substantial. *Id.* §§ 1232g(f), 1234c(a).

In addition, Congress in FERPA went on to address specifically the issue of individual complaints, again looking to the Secretary to supervise the remedy. FERPA directs that "[t]he Secretary shall establish or designate an office and review board within the Department for the purpose of investigating, processing, reviewing, and adjudicating * * * complaints which may be filed concerning alleged violations of [FERPA]." *Id.* § 1232g(g). Congress also specified that, "[e]xcept for the conduct of hearings, none of the functions of the Secretary under [FERPA] shall be carried out in any of the regional offices of [the] Department." *Id.* The Secretary has carried out his responsibilities under the statute by establishing the Family Policy Compliance Office and a detailed complaint adjudication procedure. *See* 34 C.F.R. §§ 99.60-.67. Congress' intent to vest and centralize remedial authority under FERPA in the Secretary, to avoid "multiple interpretations" of FERPA, 120 Cong. Rec. 39,866 (1974), would be wholly undermined by allowing individual damages actions under § 1983.

The remedial scheme Congress crafted in FERPA not only reflects the absence of any unexpressed intent to confer individual rights enforceable under § 1983, it is also "sufficiently comprehensive" to evince an intent to foreclose that remedy. *Middlesex County Sewerage Auth.* v. *National Sea Clammers Ass'n*, 453 U.S. 1, 20 (1981). Congress' decision to centralize remedial authority in the Secretary "is incompatible with individual enforcement under § 1983." *Blessing*, 520 U.S. at 341. The fact that Congress expressly addressed the question of individual complaints of violations under the Act, and provided a system for considering and "adjudicating" such complaints, 20 U.S.C. § 1232g(g), readily distinguishes this case from those in which the Court has found the provided remedies not "sufficiently comprehensive" to preclude resort to § 1983.



Quite apart from the foregoing, FERPA does not confer individual rights enforceable under § 1983 because parents and students are at most third-party beneficiaries of the Spending Clause contract between schools and the Federal Government, and third-party beneficiaries enjoyed no right to enforce a contract in 1871, when § 1983 was enacted. This Court regularly construes the scope of § 1983 in accord with the common law rules in effect when it was enacted. Given the rule that third-party beneficiaries had no right to sue on the contract, the Congress that passed § 1983 would not have thought it was conferring the right to sue on the beneficiaries of conditions in legislation enacted pursuant to the spending power.

## ARGUMENT

### I. CONDITIONS ON FEDERAL FUNDING IN SPENDING CLAUSE LEGISLATION CAN BE ENFORCED UNDER § 1983 ONLY IF CONGRESS UNAMBIGUOUSLY CONFERS ON BENEFICIARIES OF THE CONDITIONS A RIGHT TO ENFORCE THEM.

#### A. When Acting Pursuant To The Spending Power, Congress Must Manifest An Unambiguous Intent To Create Individual Rights Enforceable Under § 1983.

1. Section 1983 authorizes private actions against state officials for "deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. In *Maine* v. *Thiboutot*, 448 U.S. 1 (1980), this Court held that § 1983 actions may be brought against States to enforce rights created by federal statute as well as by the Constitution. *Id.* at 4. Not every violation of a federal statute, however, contravenes § 1983—"a plaintiff must assert the violation of a federal *right*, not merely a violation of federal *law*." *Blessing*, 520 U.S. at 340 (emphases in original) (citing *Golden State Transit Corp.* v. *Los Angeles*, 493 U.S. 103, 106 (1989)). Thus, in *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1 (1981), this Court "recognized two exceptions to the application of § 1983 to statutory violations." *Sea Clammers*, 453 U.S. at 19 (citing *Pennhurst*). A § 1983 action will not lie where (1) the statute does not create "enforceable rights" under § 1983, or (2) the statute itself provides an enforcement scheme "incompatible with individual enforcement under § 1983." *Blessing*, 520 U.S. at 341. *See Sea Clammers*, 453 U.S. at 19; *Pennhurst*, 451 U.S. at 28.

Determining whether a federal statute creates rights enforceable under § 1983 requires taking "pains to analyze the statutory provisions in detail, in light of the entire legislative enactment." *Suter*, 503 U.S. at 357. A key feature of the



statute at issue in this case—FERPA—is that it is spending power legislation. *See* U.S. Const. art. I, § 8, cl. 1. Such legislation "is much in the nature of a contract:" in exchange for federal funding, recipients agree to comply with federally-imposed conditions. *Pennhurst*, 451 U.S. at 17. This "contractual nature has implications for our construction of the scope of available remedies." *Gebser* v. *Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287 (1998). As the Court explained in *Suter*:

> The legitimacy of Congress' power to legislate under the spending power * * * rests on whether the State voluntarily and knowingly accepts the terms of the "contract." There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. [503 U.S. at 356 (quoting *Pennhurst*, 451 U.S. at 17).]

Whether a Spending Clause statute is enforceable under § 1983 thus turns on whether Congress "unambiguously confer[red] upon the * * * beneficiaries of the Act a right to enforce the requirement" at issue. *Suter*, 503 U.S. at 357. *See also Gebser*, 524 U.S. at 287 ("When Congress attaches conditions to the award of federal funds * * *, we examine closely the propriety of private actions holding the recipient liable in monetary damages for noncompliance with the condition. * * * Our central concern * * * is with ensuring that 'the receiving entity of federal funds [has] notice that it will be liable for a monetary award.' ") (citation omitted).

This painstaking analysis "in detail," this "close" examination for "unambiguous" intent, is directed not to whether the statute at issue "created unspecified 'rights,' " but rather to the more exacting inquiry into whether the statute confers a "protected individual interest," "an *individual* entitlement." *Blessing*, 520 U.S. at 343 (emphasis in original). To aid that

inquiry, the Court has "traditionally looked at three factors" in considering whether a federal statute confers individual rights enforceable under § 1983: whether the provision in question was intended to benefit the putative plaintiff, whether the interest the plaintiff asserts is so "vague and amorphous" that "its enforcement would strain judicial competence," and whether the statute "unambiguously impose[s] a binding obligation on the States" *Id.* at 340-341. At bottom, the "inquiry focuses on congressional intent," *id.* at 341, and "[t]he most important inquiry * * * is whether Congress intended to create the private remedy sought by the plaintiffs." *Suter*, 503 U.S. at 364. That intent must be expressed "unambiguously" before spending power legislation will be held to give rise to individual rights enforceable under § 1983. *Id.* at 357, 363.

2. This Court's decisions that address whether Spending Clause statutes confer § 1983 rights are characterized by a rigorous examination of whether the requisite unambiguous intent is present. In *Wright* v. *City of Roanoke Redevelopment & Housing Authority*, 479 U.S. 418 (1987), for example, the Court found that public housing tenants had the right to enforce certain rent ceilings with respect to utility charges. As the Court later explained in *Blessing*, "we focused our analysis on a specific statutory provision limiting 'rent' to 30 percent of a tenant's income." 520 U.S. at 342. The Court found "little substance" to the claim that the statute did not confer "specific or definable rights," given that the statutory rent ceiling plainly established "a mandatory limitation focusing on the *individual* family and its income." *Wright*, 479 U.S. at 430 (emphasis added). In addition, "congressional and agency actions indicat[ed] that enforcement authority [was] not centralized and that private actions were anticipated." *Id.* at 424-425.

In *Wilder* v. *Virginia Hospital Association*, 496 U.S. 498, 503 (1990), the Court concluded that Congress created rights enforceable under § 1983 when it required States participating in the Medicaid Program to reimburse health care providers at rates "which the State finds * * * are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities." "[T]he statute and regulations set forth in some detail the factors to be considered" in setting rates, *Suter*, 503 U.S. at 359 (citing *Wilder*, 496 U.S. at 519 n.17), and the statute provided an "objective benchmark" by requiring that rates be sufficient to compensate "efficiently and economically operated facilities" offering "reasonable access to eligible participants." *Wilder*, 496 U.S. at 519. The legislative history supported the Court's conclusion that "Congress * * * understood the Act to grant health care providers enforceable rights." *Id.* at 518. Congress had explained in repealing another provision that it did not intend "in any way [to] contraven[e] or constrain[ ] the rights [of the parties involved] to seek such prospective, injunctive relief in a federal or state judicial forum." *Id.* at 517-518. These factors persuaded the Court that Congress intended to create rights enforceable under § 1983.



In *Suter*, on the other hand, the Court held that Congress did not create § 1983 rights when it required States to have child welfare plans providing for "reasonable efforts" to prevent removal of children from their homes and to facilitate reunification of families. 503 U.S. at 353, 354. The Court concluded that the Act required only that States "have a plan approved by the Secretary which contains the 16 listed features," *id.* at 358, and did not create rights in individuals. The Court found it significant that the Act established its own "enforcement mechanisms," including the authority of the Secretary of Health and Human Services to reduce or eliminate federal funding to a State. *Id.* at 360. The Act also required certain state court findings as a prerequisite to removal of a child from his or her home. As the Court explained, "these statutory provisions * * * show that the absence of a remedy to private plaintiffs under § 1983 does not make the 'reasonable efforts' clause a dead letter." *Id.* at

360-361 (footnote omitted). In light of this statutory text and structure, the Court concluded that the Act did not meet the prerequisite to § 1983 enforceability of "unambiguously confer[ring] upon the * * * beneficiaries of the Act a right to enforce the requirement" at issue. *Id.* at 357.

In *Blessing*, the Court similarly held that a statute setting forth requirements for state child support enforcement programs to which States had to agree in order to receive certain federal funds did not "give individuals a federal right to force a state agency to substantially comply with [the requirements]." 520 U.S. at 333. If a State did not "substantially comply," the Secretary of HHS was authorized to reduce the State's grant. The Secretary interpreted "substantial compliance" as 75, 90, or 100 percent compliance, depending on the requirement. *Id.* at 335. This Court held that "the requirement that a State operate its child support program in 'substantial compliance' with [the federal requirements] was not intended to benefit individual children and custodial parents, and therefore it does not create a federal right." *Id.* at 343. "Far from creating an *individual* entitlement to services," the Court explained, "the standard is simply a yardstick for the Secretary to measure the *system-wide* performance of a State's * * * program." *Id.* (emphases in original). The Court noted that "even when a State is in 'substantial compliance' * * *, any individual plaintiff might still be among the 10 or 25 percent of persons whose needs ultimately go unmet." *Id.* at 344. Because the statute was aimed at "the aggregate services provided by the State," rather than "whether the needs of any particular person have been satisfied," it did not confer individual rights and could not be enforced by § 1983. *Id.* at 343.

This Court also held that the court of appeals had erred in "taking a blanket approach to determining whether [the federal statute] creates rights," and remanded for the district court to determine which particular statutory provisions the plaintiffs alleged conferred rights. *Id.* at 344. Plaintiffs



asserting statutory rights in § 1983 actions must "identify with particularity the rights they claim[ ]," to enable the court to determine whether the statute creates the specific claimed right. *Id.* at 342.

These precedents set forth certain guiding principles. First, as noted, Congress—when it acts pursuant to its spending power—must unambiguously express its intent to confer rights enforceable under § 1983. *Suter*, 503 U.S. at 357, 363. In addition, since an action under § 1983 is brought to enforce individual rights, the underlying statute must confer specific, individual entitlements, not merely impose systemic obligations on funding recipients to act in a certain manner. Thus, the enforceable rent ceiling provision in *Wright* "focus[ed] on the individual family and its income," 479 U.S. at 431, and the reimbursement statute in *Wilder* directed federal funds to health care providers who thus had a specific claim for adequate payment for services rendered. 496 U.S. at 503. *See also Maine* v. *Thiboutot*, *supra* (considering claim that State deprived plaintiffs of welfare benefits by miscalculating amount owed). *Suter* and *Blessing*, in contrast, concerned systemic standards of performance rather than individual entitlements, *see Blessing*, 520 U.S. at 343, and accordingly did not give rise to rights enforceable under § 1983.[4]

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[4] *Cf. Gebser*, 524 U.S. at 287 (according different scope to remedies available under Title VII and Title IX because "whereas Title VII aims centrally to compensate victims of discrimination, Title IX focuses more on 'protecting' individuals from discriminatory *practices* carried out by recipients of federal funds") (emphasis added).

### B. Whether A Particular Spending Clause Statute Confers § 1983 Rights Entails Considerations of Federalism, Separation of Powers, And Administrative Deference.

Application of the foregoing principles to the statutory interpretation question of whether Congress intended a spending power statute to give rise to rights enforceable under § 1983 must be informed by an appreciation of the fundamental concerns implicated by such an undertaking. First, conditions on federal funding implicate not only contractual concerns but issues of federalism as well. As Justice Frankfurter noted, the issues raised under § 1983 concern "a basic problem of American federalism" that "has significance approximating constitutional dimension." *Monroe* v. *Pape*, 365 U.S. 167, 222 (1961) (Frankfurter, J., dissenting).

> [T]he Spending Clause power, if wielded without concern for the federal balance, has the potential to obliterate distinctions between national and local spheres of interest and power by permitting the Federal Government to set policy in the most sensitive areas of traditional state concern * * *. A vital safeguard for the federal balance is the requirement that, when Congress imposes a condition on the States' receipt of federal funds, it "must do so unambiguously." [*Davis* v. *Monroe County Bd. of Educ.*, 526 U.S. 629, 654 (1999) (Kennedy, J., dissenting) (quoting *Pennhurst*, 451 U.S. at 17).]

Second, uncertainty as to what rights are conferred by Spending Clause statutes entails profound separation of powers concerns. Whether a federal statute gives rise to rights enforceable in a federal damages action is a quintessential *legislative* judgment. "Like substantive law itself, private rights of action to enforce federal law must be created by Congress." *Alexander* v. *Sandoval*, 532 U.S. 275, 286 (2001). To the extent federal courts are loosed from the mooring of unambiguous congressional intent and obliged to



pick and choose which federal requirements may be enforced in judicial actions and which may not—guided only by an indeterminate multi-factor balancing test—they essentially assume a legislative role by supplanting congressional intent with their own. *See id.* at 287 (" 'Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals.' ") (quoting *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 365 (1991) (Scalia, J., concurring in part and concurring in judgment)); *The Federalist* No. 78, at 466 (Alexander Hamilton) (C. Rossiter ed. 1961) (" 'there is no liberty if the power of judging be not separated from the legislative and executive powers' ") (quoting Montesquieu, I *Spirit of Laws* 181). If courts take it upon themselves to decide such questions, they encourage Congress to "shirk its constitutional obligation and leave the issue to the courts to decide." *Cannon* v. *University of Chicago*, 441 U.S. 677, 743 (1979) (Powell, J., dissenting). Important political questions would be resolved without being subjected to the "open debate of the democratic process." *Id.* That debate would certainly have been robust had anyone suggested when FERPA was enacted—years before *Maine* v. *Thiboutot* was decided—that the statute would confer on parents and students a right to bring federal damages actions for a school's contravention of any of the conditions on federal funding Congress imposed.

Third, courts intrude not only on the power of Congress, but on the authority of the Executive branch, when they bring within their purview issues delegated by Congress to administrative agencies. As it did in FERPA, Congress often authorizes an expert agency to elaborate on statutory requirements by promulgating interpretive regulations, providing technical assistance, or developing a common law of agency interpretation through agency resolution of complaints and other agency enforcement actions. *See* 20 U.S.C. § 1232g(g) (centralized Department of Education office for

"adjudicating" FERPA complaints). To infer the availability of federal court actions under § 1983 in such a case would intrude on Congress' intent by shifting the locus of development under the law from the Executive branch to the federal courts.

The ensuing § 1983 actions would involve the federal courts in issues of narrow interest, crowd their dockets, and require them to resolve questions Congress thought better suited to resolution by an agency with technical knowledge and first-hand experience in the regulated area. In addition, such lawsuits would likely produce inconsistent precedents where Congress intended uniformity. *See Conboy* v. *AT&T Corp.*, 241 F.3d 242, 253 (2d Cir. 2001) ("[A] private right of action would place the [agency's] 'interpretative function squarely in the hands of private parties and some 700 federal district judges, instead of in the hands of the [agency and] * * * would * * * deprive the [agency] of necessary flexibility and authority in creating, interpreting, and modifying * * * policy.' ") (quoting *New England Tel. & Tel. Co.* v. *Public Utils. Comm'n*, 742 F.2d 1, 6 (1st Cir. 1984) (Breyer, J.), *cert. denied*, 476 U.S. 1174 (1986)).

Each of the foregoing principles—federalism, the separation of powers, and the respect courts accord congressional delegation of authority to expert agencies—should inform judicial inquiry into whether a Spending Clause statute creates rights enforceable under § 1983. These considerations suggest that to confer such rights, the statute must unambiguously convey the intent to create individual rights and to permit those rights to be enforced by private actions in federal court. We turn now to whether FERPA meets that standard.



## II. FERPA DOES NOT CONTAIN THE UNAMBIGUOUS EXPRESSION OF CONGRESSIONAL INTENT REQUIRED TO CREATE ENFORCEABLE PRIVATE RIGHTS.

### A. FERPA's Text And Structure Do Not Create Rights Enforceable Under § 1983.

FERPA's operative provisions are not phrased in terms of individual rights. Instead, the statute merely conditions the availability of federal funds on an institution not having specified policies or practices. *See* 20 U.S.C. § 1232g(b)(1) ("[n]o funds shall be made available * * * to any educational agency or institution which has a policy or practice of permitting the release of education records * * * of students without * * * written consent"); *id.* § 1232g(b)(2) ("[n]o funds shall be made available * * * to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records [except as provided]"). FERPA's language and structure do not confer individual rights, but rather are "directed to the conditions schools must meet to receive federal funds." *Owasso Indep. Sch. Dist. No. I-011* v. *Falvo*, No. 00-1073 (U.S. Feb. 19, 2002), slip op. at 3. *See Sandoval*, 532 U.S. at 289 ("Statutes that focus on the person regulated rather than the individuals protected create 'no implication of an intent to confer rights on a particular class of persons.' ") (quoting *California* v. *Sierra Club*, 451 U.S. 287, 294 (1981)); *Pennhurst*, 451 U.S. at 24 n.18 (finding no individual right when statute conditioned funding on State not having "substandard *institutions*. Nothing reveals an intent to condition the grant of federal funds under the Act on the State's promise to provide [alleged rights] to *individuals*.") (emphases in original).

That is clear not only from the fact that FERPA's language addresses conditions on the receipt of funding, but also from the fact that the conditions refer to the recipient's "policy or practice." 20 U.S.C. §§ 1232g(b)(1), (2). Unlike the situa-

tion in *Wright* and *Wilder*, particular individuals are not accorded an entitlement to be treated in any particular manner. Individual parents and students are, of course, affected in significant ways by the policy choices reflected in FERPA, just as individual children were affected by the statutes at issue in *Suter* and *Blessing*. But Congress sought to implement its aims in FERPA and in those cases not by conferring individual rights, but by prohibiting recipients of federal funds from adopting a systemic "policy or practice." Like the statute in *Blessing*, FERPA does not create "an *individual* entitlement." *Blessing*, 520 U.S. at 343 (emphasis in original). Rather, the statute's plain language demonstrates that Congress was concerned with "*systemwide* performance," not with creating a "protected individual interest." *Id.* (emphasis in original). FERPA's "policy or practice" requirement is aimed at "the aggregate," rather than "whether the needs of any particular person have been satisfied." *Id.* *See Smith* v. *Duquesne Univ.*, 612 F. Supp. 72, 80 (W.D. Pa. 1985) (FERPA adopted to address "systemic, not individual" violations), *aff'd without op.*, 787 F.2d 583 (3d Cir. 1986).

Analyzing "the statutory provisions in detail, in light of the entire legislative enactment," *Suter*, 503 U.S. at 357, confirms this conclusion. Here, the provision that respondent asserts creates an individual right is FERPA's disclosure provision. First Amended Compl. ¶ 3.11; Opp. Cert. 13. *See Blessing*, 520 U.S. at 342 (plaintiff must "identify with particularity the rights [he] claim[s]"). Comparison of that provision—subsection (b) of 20 U.S.C. § 1232g—with other provisions in FERPA reveals that in the disclosure provision Congress used language particularly focused on systemwide performance and avoided any "rights" language. While subsection (a)(1), for example, which addresses access to student records, speaks in terms of the "right" of parents to inspect and review such records, *see* 20 U.S.C. §§ 1232g(a)(1)(A), (B), reference to "rights" is entirely



absent from the disclosure provision, subsection (b). The omission of any reference to "rights" in subsection (b) suggests that Congress did not intend to create an individual right to consent to disclosure of education records. *Barnhart* v. *Sigmon Coal Co.*, No. 00-1307 (U.S. Feb. 19, 2002), slip op. at 12 ("[I]t is a general principle of statutory construction that when 'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' ") (quoting *Russello* v. *United States*, 464 U.S. 16, 23 (1983)).[5]

### B. FERPA's Administrative Enforcement Scheme, Including Provision For Adjudicating Individual Complaints, Confirms That Congress Did Not Intend To Authorize Enforcement Under § 1983.

This conclusion is confirmed by considering the remedies that Congress chose to provide in FERPA itself. Those remedies are plainly incompatible with § 1983 rights. As this Court has noted, "[i]n legislation enacted pursuant to the spending power, the typical remedy for state noncompliance with federally imposed conditions is not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds." *Pennhurst*, 451 U.S. at 28. Congress specifically addressed enforcement of FERPA conditions on federal funds in 20 U.S.C. § 1232g(f), entitled "[e]nforcement; termination of assistance." Under § 1232g(f), the Secretary of Education

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[5] For the other reasons set forth in this brief, we believe Congress created no rights enforceable under § 1983 when it enacted FERPA, even under the access provisions. *See Pennhurst*, 451 U.S. at 18 (rejecting argument that statutory provision is enforceable because it "speaks in terms of 'rights' "). But at the very least the focused approach mandated by this Court in *Blessing* confirms that no such rights were created under the disclosure provision on which respondent relies.

> shall take appropriate actions to enforce this section and to deal with violations of this section, in accordance with this chapter, except that action to terminate assistance may be taken only if the Secretary finds there has been a failure to comply with this section, and he has determined that compliance cannot be secured by voluntary means.

By authorizing the Secretary to take enforcement action "in accordance with this chapter"—Chapter 31 of Title 20, the General Education Provisions Act—FERPA expressly incorporates the broad remedies conferred on the Secretary under 20 U.S.C. §§ 1234c-1234f. Those remedies—invocable if a recipient "is failing to comply *substantially* with any requirement," *id.* § 1234c(a) (emphasis added)—include (1) withholding federal funds; (2) issuing an administrative complaint to compel compliance through a cease and desist order; and (3) entering into compliance agreements. *See id.* §§ 1234c(a)(1)-(3). The Secretary is also empowered to take "any other action authorized by law." *Id.* § 1234c(a)(4). That includes filing a civil enforcement action in federal court. *See, e.g., United States* v. *Miami Univ.*, 91 F. Supp. 2d 1132, 1138 (S.D. Ohio 2000) (holding that Department of Education was authorized under § 1234c(a)(4) to file suit to enforce FERPA).[6]

The facts that termination of federal financial assistance is to be a last resort only after efforts at voluntary compliance have failed, and only in cases of "substantial[ ]" noncompliance, further confirm that Congress did not intend FERPA to confer individual rights immediately enforceable in a § 1983 private damages action. Such an action for compensatory and punitive damages would be incompatible with the congressional judgment that schools should be given an

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[6] Because FERPA places conditions on the grant of federal funds, the Secretary also retains the inherent authority to sue a recipient of such funds to enforce those conditions. *See Miami Univ.*, 91 F. Supp. 2d at 1142-44 (citing cases).



opportunity for voluntary compliance before they are subjected to enforcement action. As this Court explained in addressing a related question in *Gebser*, "[w]here a statute's express enforcement scheme hinges its most severe sanction on notice and unsuccessful efforts to obtain compliance, we cannot attribute to Congress the intention to have implied an enforcement scheme that allows imposition of greater liability without comparable conditions." 524 U.S. at 290.

But Congress did not stop with providing that the Secretary shall take appropriate action, including termination of assistance, to enforce FERPA. Congress went on to address how individual complaints of violations of the Act were to be handled. This feature of FERPA plainly distinguishes this case from *Wright* and *Wilder*, and makes this an even stronger case than *Suter* or *Blessing* for finding no intent to confer individual rights enforceable under § 1983. Here again there was no suggestion that FERPA conferred rights that could be enforced under § 1983. Instead, Congress again looked to the Secretary of Education, providing that "[t]he Secretary shall establish or designate an office and review board within the Department for the purpose of investigating, processing, reviewing, and adjudicating violations of [FERPA] and complaints which may be filed concerning alleged violations of [FERPA]." 20 U.S.C. 1232g(g).

Pursuant to that statutory command, the Secretary has established the Family Policy Compliance Office ("FPCO"), designated the Office of Administrative Law Judges to act as the review board, *see* 34 C.F.R. § 99.60, and established a detailed grievance procedure. Under that procedure, FPCO investigates timely written complaints. *See id.* §§ 99.63-.66. Following its investigation, FPCO issues written notice of and the basis for its findings to the aggrieved party and the educational agency or institution named in the complaint. *Id.* § 99.66(b). If FPCO finds that an educational agency or institution has not complied with the Act, and the agency or institution does not do so within a specified period of time,

the Secretary may take appropriate enforcement action. *See* 20 U.S.C. §§ 1232g(f), 1234c; 34 C.F.R. § 99.67(a). As the First Circuit recently explained in rejecting an implied right of action under FERPA itself, "[t]he provision of a specific remedy replete with administrative safeguards argues persuasively that Congress fashioned FERPA to include precisely the remedial action that it delineated—and no other." *Frazier* v. *Fairhaven Sch. Comm.*, 276 F.3d 52, 69 (1st Cir. 2002).

Congress amended FERPA four months after enactment to respond to "extensive questioning and concern" about the Act and "perplexity among school officials and frustration among parents and students." Joint Statement in Explanation of Buckley/Pell Amendment, 120 Cong. Rec. 39,865-66 (1974). One step Congress took was to add a sentence to the subsection directing the Secretary to establish an office to adjudicate complaints under FERPA. The new sentence provides that "[e]xcept for the conduct of hearings, none of the functions of the Secretary under [FERPA] shall be carried out in any of the regional offices of [the] Department." 20 U.S.C. § 1232g(g). Congress took that unusual action "[b]ecause of the concern that regionalizing the enforcement of the law may lead to multiple interpretations of it, and possibly work a hardship on parents, students, and institutions * * *." Joint Statement, 120 Cong. Rec. 39,866.

By providing for a comprehensive and centralized administrative enforcement scheme, Congress plainly intended to concentrate the task of interpreting FERPA's ambiguous and technical requirements in the hands of an expert agency. Since its enactment, FERPA has given rise to an extraordinary volume and startling variety of interpretations by students and parents. Unlike the situation with the discrete financial requirements at issue in *Wright* and *Wilder*, questions under FERPA can arise every day in connection with any one of the 62 million covered students, *see* National Center for Educ. Statistics, U.S. Dep't of Educ., *Digest of*



*Education Statistics 2001*, at 52, 204 (forthcoming 2002), in a bewildering array of unanticipated circumstances. FPCO has issued hundreds of opinion letters that interpret the statute. *See* Dixie Snow Huefner & Lynn M. Daggett, *Commentary: FERPA Update: Balancing Access to and Privacy of Student Records*, 152 Ed. Law Rep. 469, 470 (2001) ("What once seemed like a relatively straightforward statute has become a cumbersome set of requirements with ambiguous parameters."); National Ass'n of College and Univ. Attorneys, *The Family Educational Rights and Privacy Act: A Legal Compendium* iii (Steven J. McDonald ed. 1999) (FERPA has "confused, frustrated and bedeviled college and university counsel").

Congress sensibly decided that the federal agency with technical expertise and familiarity with the educational settings in which such questions arise, rather than federal and state judges and juries in § 1983 actions around the country, should resolve the myriad technical questions regarding, for example, application of the statutory exceptions to FERPA's nondisclosure condition. Indeed, Congress directed the Department not simply to review complaints under FERPA, but to "adjudicat[e]" them. 20 U.S.C. § 1232g(g). *See Frazier*, 276 F.3d at 68 ("FERPA expressly authorizes the Secretary of Education—and only the Secretary—to take 'appropriate actions' to enforce its provisions. * * * This paradigm plainly indicates that Congress contemplated public, rather than private, enforcement."); *Norris by Norris* v. *Board of Educ. of Greenwood Cmty. Sch. Corp.*, 797 F. Supp. 1452, 1465 (S.D. Ind. 1992) ("FERPA provides expressly that the Secretary of Education is responsible for enforcing the provisions and protections of FERPA; Section 1983 does not create a private right of action for damages where the federal statute provides an exclusive administrative enforcement mechanism."); *Meury* v. *Eagle-Union Cmty. Sch. Corp.*, 714 N.E.2d 233, 239 (Ind. Ct. App. 1999) ("The enforcement provisions within FERPA explicitly provide that

the Secretary of Education is solely responsible for enforcement, thereby preempting a private cause of action [under § 1983]."), *transfer denied*, 735 N.E.2d 233 (Ind. 2000).

A holding by this Court that FERPA confers rights enforceable under § 1983 would precipitate a sharp increase in the number of such actions brought in federal court. This would place the burden of deciding FERPA claims on the courts rather than the administrative agency designated by Congress, and multiply the courts' involvement in narrow, technical disputes implicating "traditional state functions" concerning "the operation of the Nation's schools." *Owasso Indep. Sch. Dist. No. I-011* v. *Falvo*, *supra*, slip op. at 5-6, 9. *See, e.g.*, *Price* v. *Young*, 580 F. Supp. 1 (E.D. Ark. 1983) (presenting question whether anonymous faculty evaluations may be used to select high school students to honor society); *Moore* v. *Hyche*, 761 F. Supp. 112 (N.D. Ala. 1991) (parent of student denied admission to honors club sought access to faculty evaluations); *C.N.* v. *Ridgewood Bd. of Educ.*, 146 F. Supp. 2d 528 (D.N.J. 2001) (presenting question whether survey marked "voluntary" and "anonymous" provided parents and students sufficient notice under FERPA that survey was voluntary), *aff'd in part, rev'd in part and remanded*, __ F.3d __ (3d Cir. 2001) (Table).

Congress did not want a diffusion of enforcement authority under FERPA. It wanted the opposite. FERPA's pointed mandate to create a *centralized* enforcement system, *see* 20 U.S.C. § 1232g(g), contrasts with Congress' typical approach of permitting the Department of Education to enforce federal law within its ambit through its regional offices. The FERPA approach ensures that determinations regarding questions such as what constitutes an "education record" or student "directory information" and what institutional officials have a "legitimate educational interest" in information in student records will be made consistently, rather than in a patchwork of rulings in § 1983 actions by the 700 federal district court judges and thousands of state court judges across the country.



*See* Benjamin F. Sidbury, *The Disclosure Of Campus Crime: How Colleges And Universities Continue To Hide Behind The 1998 Amendment To FERPA And How Congress Can Eliminate The Loophole*, 26 J. Coll. & Univ. L. 755, 759 (2000) (there is "substantial debate, confusion, and litigation over what constitutes 'educational records' "). As Congress predicted, "multiple interpretations" of FERPA emanating from different jurisdictions would place a difficult burden on the Department in carrying out its responsibilities to adjudicate complaints and provide technical assistance. Joint Statement, 120 Cong. Rec. 39,866. Such a result—the logical consequence of inferring rights enforceable by § 1983 actions—is plainly incompatible with the uniform, unusually centralized administrative enforcement scheme the statute requires.

### C. FERPA's Legislative History Contains No Hint Of An Intent To Allow Private Damages Actions, Or To Establish Radically Different Enforcement Regimes For Public And Private Schools.

The scant legislative history confirms that Congress did not intend to create rights enforceable under § 1983 when it enacted FERPA. *See Frazier*, 276 F.3d at 69 ("FERPA's legislative history is devoid of any support for the proposition that Congress intended to allow private parties to maintain causes of action for money damages."). FERPA was introduced as a late amendment to the Education Amendments of 1974 during the Senate floor debate, and was never the subject of committee hearings. The legislative history is limited to a brief discussion in the conference report, H. Conf. Rep. No. 93-1211, at 186-187 (1974); S. Conf. Rep. No. 93-1026, at 186-187 (1974), and the Senate floor debates. 120 Cong. Rec. 13,951-56, 14,232-35, 14,579-605 (1974). Nowhere in this abbreviated record is there a single mention of any intent to create individual rights enforceable under § 1983. Indeed, the legislative history confirms that to the extent members of Congress considered remedies for

noncompliance, they considered only the remedies expressly provided in the statute. *See, e.g.*, 120 Cong. Rec. 14,587 (1974) (Sen. Ervin) ("The penalties [*sic*] for noncompliance with this act would be a loss of * * * Federal funds.").[7]

As noted, widespread confusion and controversy about FERPA prompted Congress to amend the statute just four months after its passage. Pub. L. No. 93-568, § 2 (a), 88 Stat. 1858. *See* 120 Cong. Rec. 39,865-66. The amendment was introduced as part of an appropriations bill. Again the legislative history is abbreviated, and again there is no mention of any intent to create privately enforceable rights. *See* H. Rep. No. 93-1619, at 10 (1974). Congress has

[7] When Congress enacted FERPA, a variety of state law remedies existed for parents and students injured by publication of information from educational records. In addition to defamation claims, a majority of jurisdictions recognized a tort for invasion of privacy. *See Gravina* v. *Brunswick Corp.*, 338 F. Supp. 1, 3 (D.R.I. 1972) (noting a "definite trend" of jurisdictions allowing compensable privacy claims); *Peterson* v. *Idaho First Nat'l Bank*, 367 P.2d 284, 288 (Idaho 1961). State law supplied, and continues to supply, a broad range of remedies for harmful disclosure of student information. *See, e.g.*, *Warner* v. *St. Bernard Parish Sch. Bd.*, 99 F. Supp. 2d 748, 752 (E.D. La. 2000) (refusing to dismiss claim that school's release of educational record violated state constitutional right to privacy); *Sieck* v. *Oak Park-River Forest High Sch. Dist. No. 200*, 807 F. Supp. 73, 77 (N.D. Ill. 1992) (denying defendant's motion for summary judgment on state law claim of negligent release of student suspension memorandum); *Gravatt* v. *Columbia Univ.*, No. 86 C 1308, 1986 WL 11620, at *2 (N.D. Ill. Oct. 10, 1986) (possible for plaintiff to state defamation claim for disclosure of information from educational records); *Porten* v. *University of San Francisco*, 134 Cal. Rptr. 839, 843 (Ct. App. 1976) (alleged disclosure of grades stated prima facie claim of violation of state constitutional right of privacy); *Blair* v. *Union Free Sch. Dist. #6*, 324 N.Y.S.2d 222, 227-228 (Dist. Ct. 1971) (claim that school officials released student information stated a claim for infliction of mental distress).



amended FERPA nine more times, without any allusion to an intent to create rights enforceable under § 1983.[8] *See, e.g.*, 137 Cong. Rec. E2870 (1991) (Rep. Rhodes) (referring to termination of federal funds); S. Rep. No. 102-204, at 99 (1991) (same).

FERPA applies to educational institutions and agencies that receive federal funds, a class of entities that includes public schools, colleges, and universities as well as private ones, and nearly every college and university in the country. *See* Adele P. Kimmel, *et al.*, *The* Sandoval *Decision and its Implications for Future Civil Rights Enforcement*, 76 Fla. Bar J. 24, 27 (2002) (virtually all colleges and universities receive federal funds). Neither the language of FERPA nor its legislative history indicates an intent by Congress to create two separate enforcement schemes, one for public educational institutions and agencies, the other for private ones. On the contrary, FERPA specifies in its definitional provision that "the term 'educational agency or institution' means any public or private agency or institution which is the recipient of [federal] funds." 20 U.S.C. § 1232g(a)(3). Yet inferring in FERPA rights enforceable under § 1983 would create such a two-track enforcement system. Because, as courts have unanimously held, FERPA confers no direct private right of action,[9] parents and students may not sue

[8] Pub. L. No. 96-46, § 4(c), 93 Stat. 342; Pub. L. No. 96-88, title III, § 301, title V, § 507, 93 Stat. 677, 692; Pub. L. No. 99-514, § 2, 100 Stat. 2095; Pub. L. No. 101-542, title II, § 203, 104 Stat. 2385; Pub. L. No. 102-325, title XV, § 1555(a), 106 Stat. 840; Pub. L. No. 103-382, title II, §§ 212(b)(1), 249, 261(h), 108 Stat. 3913, 3924, 3928; Pub. L. No. 105-244, title IX, §§ 951, 952, 112 Stat. 1835, 1836; Pub. L. No. 106-386, Div. B, title VI, § 1601(d), 114 Stat. 1538; Pub. L. No. 107-56, title V, § 507, 115 Stat. 367.

[9] *Frazier*, 276 F.3d at 69; *Fay* v. *South Colonie Cent. Sch. Dist.*, 802 F.2d 21, 33 (2d Cir. 1986); *Tarka* v. *Cunningham*, 917 F.2d 890, 891–892 (5th Cir. 1990); *Tarka* v. *Franklin*, 891 F.2d

private institutions for deviations from FERPA's funding conditions (except in the unusual case where, as here, the private institution is held to act under color of state law). But parents and students would, under the holding below, be permitted to file § 1983 actions against public institutions for the same conduct. As a theoretical matter, Congress might conceivably have intended to subject public and private institutions to completely different enforcement schemes, one limited to federal administrative adjudication and the other permitting private damages actions in federal court. But if Congress had intended two such radically different enforcement regimes, it is difficult to understand why it failed to provide a hint of that intent in the statute or legislative history.

### D. Under This Court's Precedents, FERPA Does Not Give Rise To Rights Enforceable Under § 1983.

In light of the foregoing, FERPA fails to satisfy any of the three factors to which this Court has "traditionally looked" to determine whether a statute confers individual rights enforceable under § 1983. *Blessing*, 520 U.S. at 340-341. First, FERPA's disclosure provision was intended to regulate the policies and practices of educational institutions, not to confer on any particular litigant an individual right not to

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102, 104 (5th Cir. 1989), *cert. denied*, 494 U.S. 1080 (1990); *Klein Indep. Sch. Dist.* v. *Mattox*, 830 F.2d 576, 579 (5th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988); *Girardier* v. *Webster College*, 563 F.2d 1267, 1276-77 (8th Cir. 1977); *Hartfield* v. *East Grand Rapids Pub. Schs.*, 960 F. Supp. 1259, 1264 (W.D. Mich. 1997); *Doe* v. *Knox County Bd. of Educ.*, 918 F. Supp. 181, 184 (E.D. Ky. 1996); *Odom* v. *Columbia Univ.*, 906 F. Supp. 188, 195 (S.D.N.Y. 1995); *Belanger* v. *Nashua, N.H., Sch. Dist.*, 856 F. Supp. 40, 42 n.4 (D.N.H. 1994); *Rothman* v. *Emory Univ.*, 828 F. Supp. 537, 542 (N.D. Ill. 1993); *Norris by Norris*, 797 F. Supp. at 1462; *Norwood* v. *Slammons*, 788 F. Supp. 1020, 1026 (W.D. Ark. 1991); *Smith* v. *Duquesne Univ.*, 612 F. Supp. at 80.



have his education records disclosed. *See id.* at 341. There is no doubt that FERPA's disclosure provision benefits students and parents, just as the statutes at issue in *Suter* and *Blessing* were intended to benefit children. But as the Court explained twenty years ago in the implied right of action context, "[t]he question is not simply who would benefit from the Act, but whether Congress intended to confer federal rights upon those beneficiaries." *California* v. *Sierra Club*, 451 U.S. at 294. *See Sandoval*, 532 U.S. at 289. Conditioning federal funds on institutions not having certain policies or practices adverse to students and parents, and requiring the Secretary to establish a remedial regime to which students or parents with complaints may resort, bespeak an intent to benefit students and parents—but not by conferring on them individual rights enforceable under § 1983.

Second, any individual nondisclosure "right" claimed by respondent under FERPA is necessarily vague and amorphous because FERPA does not confer on any *individual* the right to be free from specific disclosures. As it did with the statute at issue in *Blessing*, 520 U.S. at 343-344, Congress in FERPA aimed for a pattern of compliance, not perfect compliance. That is clear from the statute's phrasing in terms of a recipient's "policy or practice," and the statutory prerequisites to funding termination that any failure to comply be "substantial[ ]" and efforts at voluntary compliance fruitless. *See* 20 U.S.C. §§ 1232g(f), 1234c(a). Any particular disclosure thus does not, standing alone, constitute a breach of the funding condition allegedly giving rise to enforceable rights. For any given plaintiff, therefore, it is impossible to know whether he is among those "whose needs ultimately [may] go unmet." *Blessing*, 520 U.S. at 344.

Third, the only "binding obligation" that FERPA imposes on federal funds recipients with respect to disclosure of student records is conditioning federal funds on the recipient not having certain policies and practices. FERPA does not

impose a binding obligation with respect to any individual student's education records—and any such obligation certainly is not "unambiguous." *See id.* at 341. Further, even the obligation to refrain from certain policies and practices is vague and amorphous, in light of the ambiguity of key statutory terms and the vast range of records and circumstances that could be considered to be within the scope of this pathbreaking statute. To know whether a particular policy or practice is consistent with FERPA's funding conditions, a school—or a court—must determine whether, for example, it entails "education records" and "personally identifiable information," and whether a disclosure is to an official with a "legitimate educational interest"—terms that are subject to widely varying interpretations. *See generally Falvo, supra.*

For these reasons, the FERPA provision which respondent asserts confers rights enforceable under § 1983 differs from the provisions this Court held to be individually enforceable in *Wright* and *Wilder* and is more like the provisions the Court held not enforceable in *Suter* and *Blessing*. First, the requirements in *Wright* and *Wilder* "focused on the individual," *Wright*, 479 U.S. at 431, and conveyed specified monetary interests—in *Wright*, a limit on the amount of rent tenants could be charged, *id.*; in *Wilder*, monetary reimbursement to health care providers, 496 U.S. at 503. By contrast, FERPA's disclosure provision addresses only the presence of a "policy or practice" of disclosure of education records and thus does not confer a specific entitlement on any individual student or parent. In that regard, FERPA is similar to the statutes at issue in *Suter* and *Blessing*, which concerned systemic standards of performance rather than individual entitlements. *See Blessing*, 520 U.S. at 343.

Second, FERPA provides for a comprehensive, centralized federal administrative enforcement system, under which the Department of Education is to "adjudicat[e]" individual complaints under the statute, and is to do that at headquarters, to preclude "multiple interpretations" of the Act. 20 U.S.C.



§ 1232g(g); 120 Cong. Rec. 39,866. That differs from the statute in *Wilder*—which provided for *no* federal administrative enforcement scheme and under which "[m]ost [s]tates" precluded the type of claim at issue in that case, 496 U.S. at 523—and the statute in *Wright*, under which "Congress' aim was to provide a *decentralized* * * * administrative process." 479 U.S. at 425, 426 (emphasis added) (internal quotations omitted).

Third, the legislative history of FERPA contains no indication that Congress intended to create individual rights enforceable under § 1983—even though the resulting two-track enforcement system suggests Congress would have discussed such a regime had it in fact contemplated it—whereas this Court concluded from the legislative history in *Wright* that "private actions were anticipated," *id.* at 425, and from that in *Wilder* that "Congress * * * understood the Act to grant health care providers enforceable rights." 496 U.S. at 518.

## III. CONGRESS PRECLUDED ENFORCEMENT UNDER § 1983 BY PROVIDING A COMPREHENSIVE ENFORCEMENT SCHEME INCOMPATIBLE WITH SUCH ACTIONS.

This Court has recognized that "§ 1983 is a statutory remedy and Congress retains the authority to repeal it or replace it with an alternative remedy." *Smith* v. *Robinson*, 468 U.S. 992, 1012 (1984). Thus, even if a statute creates an enforceable "right" within the meaning of § 1983—and, as we have explained, FERPA does not—an action under § 1983 will still not lie if Congress has evinced an intent to " 'specifically foreclose[]' " such a remedy. *Blessing*, 520 U.S. at 341 (quoting *Smith*, 468 U.S. at 1005 n.9). This Court has found the requisite congressional intent where the statute itself contains "a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983." *Id.*

Such a scheme exists under FERPA. First, as discussed above, the statute directs the Secretary of Education "to enforce [the Act] and * * * deal with violations of [the Act]." 20 U.S.C. § 1232g(f). Second, a range of remedies is available to the Secretary to enforce the Act, *see id.* §§ 1232g(f), 1234c(a)(1)-(3), including the broad power to take "any other action authorized by law." *Id.* § 1234c(a)(4). Third, FERPA expressly addresses individual grievances under the Act, directing the Secretary to establish an office to "investigat[e], process[], review[], and adjudicat[e] * * * complaints." *Id.* § 1232g(g). Fourth, the Department has set forth regulations detailing the complaint procedure, a procedure that may culminate in enforcement action by the Secretary. *See* 34 C.F.R. §§ 99.63-.67.

In view of these "unusually elaborate enforcement provisions," *Sea Clammers*, 453 U.S. at 13, it is difficult to imagine that Congress intended, *sub silentio*, a § 1983 remedy for FERPA violations. Indeed, FERPA's remedial scheme quite closely resembles other enforcement regimes this Court has found "sufficiently comprehensive" to demonstrate Congress' view that § 1983 actions are incompatible with the statute. *Id.* at 20.

In *Sea Clammers*, for instance, this Court determined that the enforcement schemes in the Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.*, and the Marine Protection, Research, and Sanctuaries Act, 33 U.S.C. § 1401 *et seq.*, evinced Congress' intent to foreclose a § 1983 remedy. The Environmental Protection Agency was authorized to enforce those statutes through noncompliance orders, civil suits, and civil and criminal penalties, and private parties were permitted to seek enforcement of the statutes (but not damages) by filing citizen suits. *See* 453 U.S. at 13-14. Here, too, the Secretary is authorized to use noncompliance orders and civil suits—as well as numerous other



remedies—as enforcement tools.[10] Private parties, meanwhile, are given the opportunity to seek enforcement of the Act by filing a complaint with FPCO, which may ultimately lead the Secretary to exercise one of FERPA's numerous enforcement options to achieve compliance.

Similarly, in *Smith* v. *Robinson*, this Court concluded that Congress intended the remedial scheme established under the Education of the Handicapped Act, 20 U.S.C. § 1400 *et seq.*, to be the "exclusive avenue" for asserting constitutional claims to a publicly-financed special education. 468 U.S. at 1009. There, the statute established a local administrative review procedure to ensure the provision of appropriate educational opportunities to disabled children, including a complaint process that could ultimately result in federal judicial review. *Id.* at 1009-11. *See also* 20 U.S.C. § 1415 (1982). FERPA also establishes a "carefully tailored" administrative mechanism, 468 U.S. at 1009—at the federal, not local, level—to ensure compliance, which may also ultimately lead to federal court. *See* 20 U.S.C. § 1234c(a)(4) (authorizing Secretary to take "any other action authorized by law"). As this Court recognized in *Smith*, "[a]llowing a plaintiff to circumvent [such] administrative remedies" would "render [them] superfluous." 468 U.S. at 1011, 1012.

At the same time, FERPA's enforcement scheme differs in material respects from those this Court has found not "sufficiently comprehensive" to preclude resort to § 1983. For instance, in *Wright*, the Court rejected the argument that Congress intended to vest in the Department of Housing and Urban Development ("HUD") the exclusive authority to enforce the Brooke Amendment to the Housing Act, 42 U.S.C. § 1401 *et seq*. The Court was particularly concerned

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[10] Although the Secretary may not be authorized to seek civil or criminal penalties, the Secretary is authorized to remedy FERPA violations by cutting off federal funds, and thus is able to impose a monetary sanction upon violators. *See* 20 U.S.C. § 1234c(a)(1).

that the only remedy afforded private parties was a local grievance procedure, and that "the statute [did] not require and HUD [had] not provided any formal procedure for tenants to bring [complaints] to HUD's attention." 479 U.S. at 428. Because HUD infrequently conducted audits of local public housing authorities subject to the Brooke Amendment, "there [was] little occasion [for HUD] to exercise [its] power[s]" to sue to enforce annual contributions contracts or to cut off federal funds. *Id.* Here, in contrast, FERPA *does* require and the Department of Education *has* provided a formal procedure for parents and students to bring complaints to the Department's attention. *See* 20 U.S.C. § 1232g(g); 34 C.F.R. §§ 99.63-.67.

Likewise, in *Wilder*, the Court held that the Medicaid Act, 42 U.S.C. § 1396 *et seq.*, failed to demonstrate Congress' intent to preclude a § 1983 action challenging the method by which a State reimbursed providers, where the Act afforded only a "limited" state administrative procedure for reviewing provider claims for payment, and where the Secretary of Health and Human Services had only "limited oversight" of the payment rates set by the States. 496 U.S. at 521-523. Most recently, in *Blessing*, this Court held that the federal law at issue there did not create a "sufficiently comprehensive" enforcement scheme where that law contained "*no* private remedy—either judicial or administrative—through which aggrieved persons [could] seek redress," and where the Secretary of Health and Human Services had only "limited powers" to audit and cut off federal funding. 520 U.S. at 347-348 (emphasis added).

Such enforcement regimes simply do not compare with one which (1) provides private parties with a detailed federal administrative procedure for bringing to the Secretary's attention *any* alleged violation of the Act; (2) grants the Department of Education the power to "investigat[e], process[], review[], and adjudicat[e]" violations and complaints of violations, 20 U.S.C. § 1232g(g); and (3) provides the



Secretary with "so many specific statutory remedies," *Sea Clammers*, 453 U.S. at 20, including "any * * * action authorized by law." 20 U.S.C. § 1234c(a)(4). In addition, with respect to the availability of individual redress, FERPA's enforcement scheme leaves intact the right to sue for damages under state law for invasion of privacy or other torts committed in connection with personally identifiable education records. *See* note 7, *supra*. Doe in this case received some $600,000 for defamation and invasion of privacy under state law. Pet. App. 9a.[11] In light of all the foregoing, it cannot be that Congress unambiguously intended but just neglected to mention that parties may seek additional enforcement by filing a federal damages action under § 1983.

## IV. RESPONDENT IS NOT A PARTY TO THE SPENDING CLAUSE CONTRACT AND ACCORDINGLY HAS NO RIGHT UNDER § 1983 TO SUE ON THE CONTRACT.

Quite apart from the foregoing, FERPA confers no rights enforceable by parents and students under § 1983 because parents and students are not parties to the Spending Clause contract. Under the FERPA contract, educational agencies and institutions agree with the Federal Government to refrain from certain policies and practices as a condition of federal funding. Respondent, like other students and parents, was at most a third-party beneficiary of this contract; he was certainly not a party.

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[11] The availability of state law remedies is not, of course, itself a basis for supplanting a § 1983 federal remedy. *See Wright*, 479 U.S. at 429. But where, as here, there is no evidence that Congress regarded compensatory relief available under state law as in any way inadequate, the absence of a compensation provision in the federal remedial scheme should not prevent a finding that the federal scheme is sufficiently comprehensive to preclude resort to § 1983.

"Until relatively recent times, the third-party beneficiary was generally regarded as a stranger to the contract, and could not sue upon it." *Blessing*, 520 U.S. at 349 (Scalia, J., concurring) (citing 1 William W. Story, *A Treatise on the Law of Contracts* 549-550 (4th ed. 1856)). This was generally the law in 1871,[12] when § 1983 was originally enacted as § 1 of the Civil Rights Act of 1871. *Mitchum* v. *Foster*, 407 U.S. 225, 238 (1972). The Congress that enacted § 1983, therefore, would not have regarded Spending Clause legislation as conferring the right to sue upon the third-party beneficiaries of the promises made by the recipients of federal funds.

That contemporaneous understanding is directly pertinent in assessing the scope of § 1983. *See City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981) ("It is by now well

[12] *See, e.g.*, 1 Francis Hilliard, *The Law of Contracts* 422 (1872) ("In general, the party with whom a contract is made is the proper plaintiff in a suit upon such contract, although the beneficial interest is in other persons."); 1 William W. Story, *A Treatise on the Law of Contracts* 509 (M. Bigelow ed. 1874) ("tendency of the courts" is "that no stranger to the consideration can take advantage of a contract, though made for his benefit"); Christopher C. Langdell, *A Summary of the Law of Contracts* 79 (2d ed. 1880) ("A binding promise vests in the promisee, and in him alone, a right to compel performance of the promise"); 2 Francis Wharton, *A Commentary on the Law of Contracts* 155 (1882) ("no one can sue on a contract to which he was not a party"): J. I. Clark Hare, *The Law of Contracts* 193 (1887) ("[i]t is equally well settled, on a principle common to every system of jurisprudence, that the obligation of a contract is under ordinary circumstances confined to the parties, and cannot be enforced by third parties").

The law at the time recognized only narrow exceptions to this general rule, such as where a third party was related to the promisee, or where the third party was owed a duty by the promisee as the result of performance amounting to consideration. *See* 2 Wharton, *supra*, at 162-163. Neither exception has any application here.



settled that the tort liability created by § 1983 cannot be understood in a historical vacuum."). As this Court has stated, "[o]ne important assumption underlying the Court's decisions in this area is that members of the 42d Congress were familiar with common-law principles, * * * and that they likely intended these common-law principles to obtain, absent specific provisions to the contrary." *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 67 (1989) (quotation omitted). *See Kalina* v. *Fletcher*, 522 U.S. 118, 123 (1997) ("Congress intended [§ 1983] to be construed in the light of common-law principles that were well-settled at the time of its enactment."). It is now generally accepted that third-party beneficiaries *do* have enforceable rights under a contract, *see* 13 Samuel Williston, *A Treatise on the Law of Contracts* § 37:12, at 103 (Richard A. Lord ed., 4th ed. 2000) ("By the mid-1940's, * * * [t]he great majority of American courts permit[ted] a recovery by the third party beneficiary whether he be a donee beneficiary or creditor beneficiary"), but that was not the case when Congress enacted § 1983, and it is the common law at that time—not today—that informs the question of legislative intent. *See Blessing*, 520 U.S. at 350 (Scalia, J., concurring). The Court has frequently construed the reach of § 1983 in accord with the common law as it existed in 1871.[13] That approach leads to the conclusion that FERPA, as Spending Clause legislation, does not confer on the beneficiaries of funding conditions rights enforceable under § 1983. *See Westside Mothers* v. *Haveman*, 133 F. Supp. 2d 549, 581 (E.D. Mich. 2001) (in light of 1871 rule on third-party beneficiaries, "§ 1983 independently creates

[13] *See, e.g., Buckley* v. *Fitzsimmons*, 509 U.S. 259 (1993) (prosecutorial immunity); *Fact Concerts*, *supra* (municipal immunity from punitive damages); *Carey* v. *Piphus*, 435 U.S. 247 (1978) (elements of damages); *Pierson* v. *Ray*, 386 U.S. 547 (1967) (absolute immunity for state judges and "good faith and probable cause" defense for police officers); *Tenney* v. *Brandhove*, 341 U.S. 367 (1951) (absolute immunity for state legislators).

no right for beneficiaries of federal programs enacted pursuant to the Spending Power to sue") (Medicaid statute).[14]

This conclusion is consistent with this Court's repeated admonition that "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Pennhurst*, 451 U.S. at 17. "By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of this participation." *Id.* It is difficult to see how exposure to § 1983 damages actions can be considered an "unambiguous" condition expressed in a "clear voice" when the existence of a federal right enforceable under § 1983 has to be intuited from the statute—or, worse yet, its legislative history—pursuant to an indeterminate, multi-factor balancing test which, like all such tests, is "hard to apply" and "jettison[s] relative predictability for the open-ended rough-and-tumble of factors." *Jerome B. Grubart, Inc.* v. *Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 547 (1995). It is particularly difficult to conclude that Congress, when it enacted FERPA six years before the Court "ma[de] new law" in *Maine* v. *Thiboutot* by holding § 1983 applicable to statutes,

[14] The Congress that enacted § 1983 would also not have readily assumed the availability of the tort remedy it created, *see Memphis Cmty. Sch. Dist.* v. *Stachura*, 477 U.S. 299, 305-306 (1986); *Fact Concerts*, 453 U.S. at 258, for claims essentially based on contract. *See* J. I. Clarke Hare, *supra*, at 153 ("the distinction between tort and contract is fundamental"). Nor is it clear that the conditions in Spending Clause legislation qualify as "laws" under § 1983. Such conditions only become operative when the contract is accepted by a recipient; it is the resulting contract, not the federal legislation itself, that gives rise to obligations and allegedly enforceable rights. Section 1983, however, does not cover contracts. *Cf. United States* v. *Morgan*, 230 F.3d 1067, 1073 (8th Cir. 2000) ("Congress may indirectly regulate state conduct by attaching 'strings' to grants of money given to state and local governments, but those strings aren't *laws*.") (Bye, J., concurring) (emphasis in original; citation omitted), *cert. denied*, 122 S. Ct. 62 (2001).



*Thiboutot*, 448 U.S. at 33 (Powell, J., dissenting), spoke with the clarity demanded in Spending Clause legislation.

* * *

For the Nation's elementary and secondary schools and its colleges and universities, the Court's answer to the question presented in this case will likely rank among the most consequential issued in the education field. Many millions of education records, as defined by FERPA, are generated every year at these institutions. The records, as FERPA defines them, come in a vast variety of forms, some of which are far from self-evident, and are properly accessible by millions of teachers and other authorized persons. The prospect that errant disclosure of such records could result in a student's or parent's lawsuit for damages under FERPA is an ominous one for educators, for education itself, and for the federal judicial system. "This Court can be insensible neither to the magnitude nor delicacy of this question." *Trustees of Dartmouth College* v. *Woodward*, 17 U.S. (4 Wheat.) 518, 625 (1819).

## CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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## STATUTORY AND REGULATORY ADDENDUM

42 U.S.C. § 1983 provides:

**§ 1983. Civil action for deprivation of rights**

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

20 U.S.C. § 1232g provides: [1]

**§ 1232g. Family educational and privacy rights**

**(a) Conditions for availability of funds to educational agencies or institutions; inspection and review of education records; specific information to be made available; procedure for access to education records; reasonableness of time for such access; hearings; written explanations by parents; definitions**

(1)(A) No funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution, as the case may be, the right to inspect and review the education records of their children. If any material or document in the education record of a student includes information on more than one student, the parents of one of such students shall have the right to inspect and review only such part of such material or document as relates to such student or to be informed of the specific information contained in such part of such material. Each educational agency or institution shall establish appropriate procedures for the granting of a request by parents for access to the education records of their children within a reasonable period of time, but in no case more than forty-five days after the request has been made.

(B) No funds under any applicable program shall be made available to any State educational agency (whether or not that agency is an educational agency or institution under this section) that has a policy of denying, or effectively prevents, the parents of students the right to inspect and review the education records maintained by the State educational agency on their children who are or have been in attendance at any school of an educational agency or institution that is subject to the provisions of this section.

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[1] Language added since 1994 is in brackets.



(C) The first sentence of subparagraph (A) shall not operate to make available to students in institutions of postsecondary education the following materials:

(i) financial records of the parents of the student or any information contained therein;

(ii) confidential letters and statements of recommendation, which were placed in the education records prior to January 1, 1975, if such letters or statements are not used for purposes other than those for which they were specifically intended;

(iii) if the student has signed a waiver of the student's right of access under this subsection in accordance with subparagraph (D), confidential recommendations—

(I) respecting admission to any educational agency or institution,

(II) respecting an application for employment, and

(III) respecting the receipt of an honor or honorary recognition.

(D) A student or a person applying for admission may waive his right of access to confidential statements described in clause (iii) of subparagraph (C), except that such waiver shall apply to recommendations only if (i) the student is, upon request, notified of the names of all persons making confidential recommendations and (ii) such recommendations are used solely for the purpose for which they were specifically intended. Such waivers may not be required as a condition for admission to, receipt of financial aid from, or receipt of any other services or benefits from such agency or institution.

(2) No funds shall be made available under any applicable program to any educational agency or institution unless the parents of students who are or have been in attendance at a school of such agency or at such institution are provided an opportunity for a hearing by such agency or institution, in

accordance with regulations of the Secretary, to challenge the content of such student's education records, in order to insure that the records are not inaccurate, misleading, or otherwise in violation of the privacy rights of students, and to provide an opportunity for the correction or deletion of any such inaccurate, misleading or otherwise inappropriate data contained therein and to insert into such records a written explanation of the parents respecting the content of such records.

(3) For the purposes of this section the term "educational agency or institution" means any public or private agency or institution which is the recipient of funds under any applicable program.

(4)(A) For the purposes of this section, the term "education records" means, except as may be provided otherwise in subparagraph (B), those records, files, documents, and other materials which—

(i) contain information directly related to a student; and

(ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

(B) The term "education records" does not include—

(i) records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute;

(ii) records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement;

(iii) in the case of persons who are employed by an educational agency or institution but who are not in attendance at such agency or institution, records made and maintained in the normal course of business which relate exclusively to such person in that person's capacity as an



employee and are not available for use for any other purpose; or

(iv) records on a student who is eighteen years of age or older, or is attending an institution of postsecondary education, which are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his professional or paraprofessional capacity, or assisting in that capacity, and which are made, maintained, or used only in connection with the provision of treatment to the student, and are not available to anyone other than persons providing such treatment, except that such records can be personally reviewed by a physician or other appropriate professional of the student's choice.

(5)(A) For the purposes of this section the term "directory information" relating to a student includes the following: the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student.

(B) Any educational agency or institution making public directory information shall give public notice of the categories of information which it has designated as such information with respect to each student attending the institution or agency and shall allow a reasonable period of time after such notice has been given for a parent to inform the institution or agency that any or all of the information designated should not be released without the parent's prior consent.

(6) For the purposes of this section, the term "student" includes any person with respect to whom an educational agency or institution maintains education records or personally identifiable information, but does not include a person who has not been in attendance at such agency or institution.

**(b) Release of education records; parental consent requirement; exceptions; compliance with judicial orders and subpoenas; audit and evaluation of federally-supported education programs; recordkeeping**

(1) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a) of this section) of students without the written consent of their parents to any individual, agency, or organization, other than to the following—

(A) other school officials, including teachers within the educational institution or local educational agency, who have been determined by such agency or institution to have legitimate educational interests, including the educational interests of the child for whom consent would otherwise be required;

(B) officials of other schools or school systems in which the student seeks or intends to enroll, upon condition that the student's parents be notified of the transfer, receive a copy of the record if desired, and have an opportunity for a hearing to challenge the content of the record;

(C) (i) authorized representatives of (I) the Comptroller General of the United States, (II) the Secretary, or (III) State educational authorities, under the conditions set forth in paragraph (3)[, or (ii) authorized representatives of the Attorney General for law enforcement purposes under the same conditions as apply to the Secretary under paragraph (3)];

(D) in connection with a student's application for, or receipt of, financial aid;

(E) State and local officials or authorities to whom such information is specifically allowed to be reported or disclosed pursuant to State statute adopted—



(i) before November 19, 1974, if the allowed reporting or disclosure concerns the juvenile justice system and such system's ability to effectively serve the student whose records are released, or

(ii) after November 19, 1974, if—

(I) the allowed reporting or disclosure concerns the juvenile justice system and such system's ability to effectively serve, prior to adjudication, the student whose records are released; and

(II) the officials and authorities to whom such information is disclosed certify in writing to the educational agency or institution that the information will not be disclosed to any other party except as provided under State law without the prior written consent of the parent of the student.

(F) organizations conducting studies for, or on behalf of, educational agencies or institutions for the purpose of developing, validating, or administering predictive tests, administering student aid programs, and improving instruction, if such studies are conducted in such a manner as will not permit the personal identification of students and their parents by persons other than representatives of such organizations and such information will be destroyed when no longer needed for the purpose for which it is conducted;

(G) accrediting organizations in order to carry out their accrediting functions;

(H) parents of a dependent student of such parents, as defined in section 152 of Title 26;

(I) subject to regulations of the Secretary, in connection with an emergency, appropriate persons if the knowledge of such information is necessary to protect the health or safety of the student or other persons; and

(J)(i) the entity or persons designated in a Federal grand jury subpoena, in which case the court shall order, for good cause shown, the educational agency or institution (and any

officer, director, employee, agent, or attorney for such agency or institution) on which the subpoena is served, to not disclose to any person the existence or contents of the subpoena or any information furnished to the grand jury in response to the subpoena; and

(ii) the entity or persons designated in any other subpoena issued for a law enforcement purpose, in which case the court or other issuing agency may order, for good cause shown, the educational agency or institution (and any officer, director, employee, agent, or attorney for such agency or institution) on which the subpoena is served, to not disclose to any person the existence or contents of the subpoena or any information furnished in response to the subpoena.

[Nothing in subparagraph (E) of this paragraph shall prevent a State from further limiting the number or type of State or local officials who will continue to have access thereunder.]

(2) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records other than directory information, or as is permitted under paragraph (1) of this subsection, unless—

(A) there is written consent from the student's parents specifying records to be released, the reasons for such release, and to whom, and with a copy of the records to be released to the student's parents and the student if desired by the parents, or

(B) except as provided in paragraph (1)(J), such information is furnished in compliance with judicial order, or pursuant to any lawfully issued subpoena, upon condition that parents and the students are notified of all such orders or subpoenas in advance of the compliance therewith by the educational institution or agency.



(3) Nothing contained in this section shall preclude authorized representatives of (A) the Comptroller General of the United States, (B) the Secretary, or (C) State educational authorities from having access to student or other records which may be necessary in connection with the audit and evaluation of Federally-supported education programs, or in connection with the enforcement of the Federal legal requirements which relate to such programs: *Provided*, That except when collection of personally identifiable information is specifically authorized by Federal law, any data collected by such officials shall be protected in a manner which will not permit the personal identification of students and their parents by other than those officials, and such personally identifiable data shall be destroyed when no longer needed for such audit, evaluation, and enforcement of Federal legal requirements.

(4)(A) Each educational agency or institution shall maintain a record, kept with the education records of each student, which will indicate all individuals (other than those specified in paragraph (1)(A) of this subsection), agencies, or organizations which have requested or obtained access to a student's education records maintained by such educational agency or institution, and which will indicate specifically the legitimate interest that each such person, agency, or organization has in obtaining this information. Such record of access shall be available only to parents, to the school official and his assistants who are responsible for the custody of such records, and to persons or organizations authorized in, and under the conditions of, clauses (A) and (C) of paragraph (1) as a means of auditing the operation of the system.

(B) With respect to this subsection, personal information shall only be transferred to a third party on the condition that such party will not permit any other party to have access to such information without the written consent of the parents of the student. If a third party outside the educational agency or institution permits access to information in violation of paragraph (2)(A), or fails to destroy information in violation

of paragraph (1)(F), the educational agency or institution shall be prohibited from permitting access to information from education records to that third party for a period of not less than five years.

(5) Nothing in this section shall be construed to prohibit State and local educational officials from having access to student or other records which may be necessary in connection with the audit and evaluation of any federally or State supported education program or in connection with the enforcement of the Federal legal requirements which relate to any such program, subject to the conditions specified in the proviso in paragraph (3).

(6)(A) Nothing in this section shall be construed to prohibit an institution of postsecondary education from disclosing, to an alleged victim of any crime of violence (as that term is defined in section 16 of Title 18), [or a nonforcible sex offense,] the [final] results of any disciplinary proceeding conducted by such institution against the alleged perpetrator of such crime [or offense] with respect to such crime [or offense].

[(B) Nothing in this section shall be construed to prohibit an institution of postsecondary education from disclosing the final results of any disciplinary proceeding conducted by such institution against a student who is an alleged perpetrator of any crime of violence (as that term is defined in section 16 of Title 18), or a nonforcible sex offense, if the institution determines as a result of that disciplinary proceeding that the student committed a violation of the institution's rules or policies with respect to such crime or offense.

(C) For the purpose of this paragraph, the final results of any disciplinary proceeding—

(i) shall include only the name of the student, the violation committed, and any sanction imposed by the institution on that student; and



(ii) may include the name of any other student, such as a victim or witness, only with the written consent of that other student.

(7)(A) Nothing in this section may be construed to prohibit an educational institution from disclosing information provided to the institution under section 14071 of Title 42 concerning registered sex offenders who are required to register under such section.

(B) The Secretary shall take appropriate steps to notify educational institutions that disclosure of information described in subparagraph (A) is permitted.]

**(c) Surveys or data-gathering activities; regulations**

Not later than 240 days after October 20, 1994, the Secretary shall adopt appropriate regulations or procedures, or identify existing regulations or procedures, which protect the rights of privacy of students and their families in connection with any surveys or data-gathering activities conducted, assisted, or authorized by the Secretary or an administrative head of an education agency. Regulations established under this subsection shall include provisions controlling the use, dissemination, and protection of such data. No survey or data-gathering activities shall be conducted by the Secretary, or an administrative head of an education agency under an applicable program, unless such activities are authorized by law.

**(d) Students' rather than parents' permission or consent**

For the purposes of this section, whenever a student has attained eighteen years of age, or is attending an institution of postsecondary education, the permission or consent required of and the rights accorded to the parents of the student shall thereafter only be required of and accorded to the student.

**(e) Informing parents or students of rights under this section**

No funds shall be made available under any applicable program to any educational agency or institution unless such agency or institution effectively informs the parents of students, or the students, if they are eighteen years of age or older, or are attending an institution of postsecondary education, of the rights accorded them by this section.

**(f) Enforcement; termination of assistance**

The Secretary shall take appropriate actions to enforce this section and to deal with violations of this section, in accordance with this chapter, except that action to terminate assistance may be taken only if the Secretary finds there has been a failure to comply with this section, and he has determined that compliance cannot be secured by voluntary means.

**(g) Office and review board; creation; functions**

The Secretary shall establish or designate an office and review board within the Department for the purpose of investigating, processing, reviewing, and adjudicating violations of this section and complaints which may be filed concerning alleged violations of this section. Except for the conduct of hearings, none of the functions of the Secretary under this section shall be carried out in any of the regional offices of such Department.

**(h) Disciplinary records; disclosure**

Nothing in this section shall prohibit an educational agency or institution from—

(1) including appropriate information in the education record of any student concerning disciplinary action taken against such student for conduct that posed a significant risk to the safety or well-being of that student, other students, or other members of the school community; or



(2) disclosing such information to teachers and school officials, including teachers and school officials in other schools, who have legitimate educational interests in the behavior of the student.

**[(i) Drug and alcohol violation disclosures**

(1) In general

Nothing in this Act or the Higher Education Act of 1965 [20 U.S.C.A. § 1001 et seq.] shall be construed to prohibit an institution of higher education from disclosing, to a parent or legal guardian of a student, information regarding any violation of any Federal, State, or local law, or of any rule or policy of the institution, governing the use or possession of alcohol or a controlled substance, regardless of whether that information is contained in the student's education records, if—

(A) the student is under the age of 21; and

(B) the institution determines that the student has committed a disciplinary violation with respect to such use or possession.

(2) State law regarding disclosure

Nothing in paragraph (1) shall be construed to supersede any provision of State law that prohibits an institution of higher education from making the disclosure described in subsection (a).

**(j) Investigation and prosecution of terrorism**

(1) In general

Notwithstanding subsections (a) through (i) or any provision of State law, the Attorney General (or any Federal officer or employee, in a position not lower than an Assistant Attorney General, designated by the Attorney General) may submit a written application to a court of competent jurisdiction for an ex parte order requiring an educational

agency or institution to permit the Attorney General (or his designee) to—

(A) collect education records in the possession of the educational agency or institution that are relevant to an authorized investigation or prosecution of an offense listed in section 2332b(g)(5)(B) of Title 18, or an act of domestic or international terrorism as defined in section 2331 of that title; and

(B) for official purposes related to the investigation or prosecution of an offense described in paragraph (1)(A), retain, disseminate, and use (including as evidence at trial or in other administrative or judicial proceedings) such records, consistent with such guidelines as the Attorney General, after consultation with the Secretary, shall issue to protect confidentiality.

(2) Application and approval

(A) In general

An application under paragraph (1) shall certify that there are specific and articulable facts giving reason to believe that the education records are likely to contain information described in paragraph (1)(A).

(B) The court shall issue an order described in paragraph (1) if the court finds that the application for the order includes the certification described in subparagraph (A).

(3) Protection of educational agency or institution

An educational agency or institution that, in good faith, produces education records in accordance with an order issued under this subsection shall not be liable to any person for that production.

(4) Record-keeping



Subsection (b)(4) of this section does not apply to education records subject to a court order under this subsection.]

20 U.S.C. § 1234c provides:

**§ 1234c. Remedies for existing violations**

(a) Whenever the Secretary has reason to believe that any recipient of funds under any applicable program is failing to comply substantially with any requirement of law applicable to such funds the Secretary may—

(1) withhold further payments under that program, as authorized by section 1234d of this title;

(2) issue a complaint to compel compliance through a cease and desist order of the Office, as authorized by section 1234e of this title;

(3) enter into a compliance agreement with a recipient to bring it into compliance, as authorized by section 1234f of this title; or

(4) take any other action authorized by law with respect to the recipient.

(b) Any action, or failure to take action, by the Secretary under this section shall not preclude the Secretary from seeking a recovery of funds under section 1234a of this title.



**Selected Provisions of Title 34 of the Code of Federal Regulations, Part 99:**

**PART 99—FAMILY EDUCATION RIGHTS AND PRIVACY**

**Subpart A—General**

**§ 99.1 To which educational agencies or institutions do these regulations apply?**

(a) Except as otherwise noted in § 99.10, this part applies to an educational agency or institution to which funds have been made available under any program administered by the Secretary, if—

(1) The educational institution provides educational services or instruction, or both, to students; or

(2) The educational agency is authorized to direct and control public elementary or secondary, or postsecondary educational institutions.

(b) This part does not apply to an educational agency or institution solely because students attending that agency or institution receive non-monetary benefits under a program referenced in paragraph (a) of this section, if no funds under that program are made available to the agency or institution.

(c) The Secretary considers funds to be made available to an educational agency or institution if funds under one or more of the programs referenced in paragraph (a) of this section—

(1) Are provided to the agency or institution by grant, cooperative agreement, contract, subgrant, or subcontract; or

(2) Are provided to students attending the agency or institution and the funds may be paid to the agency or institution by those students for educational purposes, such as under the Pell Grant Program and the Guaranteed Student Loan Program (titles IV–A–1 and IV–B, respectively, of the Higher Education Act of 1965, as amended).

(d) If an educational agency or institution receives funds under one or more of the programs covered by this section, the regulations in this part apply to the recipient as a whole, including each of its components (such as a department within a university).

**§ 99.2 What is the purpose of these regulations?**

The purpose of this part is to set out requirements for the protection of privacy of parents and students under section 444 of the General Education Provisions Act, as amended.

**§ 99.3 What definitions apply to these regulations?**

The following definitions apply to this part:

*Act* means the Family Educational Rights and Privacy Act of 1974, as amended, enacted as section 444 of the General Education Provisions Act.

*Attendance* includes, but is not limited to:

(a) Attendance in person or by correspondence; and

(b) The period during which a person is working under a work-study program.

*Dates of attendance.* (a) The term means the period of time during which a student attends or attended an educational agency or institution. Examples of dates of attendance include an academic year, a spring semester, or a first quarter.

(b) The term does not include specific daily records of a student's attendance at an educational agency or institution.

*Directory information* means information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed. It includes, but is not limited to, the student's name, address, telephone listing, electronic mail address, photograph, date and place of birth, major field of study, dates of attendance, grade level, enrollment status (*e.g.*, undergraduate or graduate; full-time or part-time), participation in officially



recognized activities and sports, weight and height of members of athletic teams, degrees, honors and awards received, and the most recent educational agency or institution attended.

*Disciplinary action or proceeding* means the investigation, adjudication, or imposition of sanctions by an educational agency or institution with respect to an infraction or violation of the internal rules of conduct applicable to students of the agency or institution.

*Disclosure* means to permit access to or the release, transfer, or other communication of personally identifiable information contained in education records to any party, by any means, including oral, written, or electronic means.

*Educational agency or institution* means any public or private agency or institution to which this part applies under § 99.1(a).

*Education records.* (a) The term means those records that are:

(1) Directly related to a student; and

(2) Maintained by an educational agency or institution or by a party acting for the agency or institution.

(b) The term does not include:

(1) Records that are kept in the sole possession of the maker, are used only as a personal memory aid, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record.

(2) Records of the law enforcement unit of an educational agency or institution, subject to the provisions of § 99.8.

(3)(i) Records relating to an individual who is employed by an educational agency or institution, that:

(A) Are made and maintained in the normal course of business;

(B) Relate exclusively to the individual in that individual's capacity as an employee; and

(C) Are not available for use for any other purpose.

(ii) Records relating to an individual in attendance at the agency or institution who is employed as a result of his or her status as a student are education records and not excepted under paragraph (b)(3)(i) of this definition.

(4) Records on a student who is 18 years of age or older, or is attending an institution of postsecondary education, that are:

(i) Made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his or her professional capacity or assisting in a paraprofessional capacity;

(ii) Made, maintained, or used only in connection with treatment of the student; and

(iii) Disclosed only to individuals providing the treatment. For the purpose of this definition, "treatment" does not include remedial educational activities or activities that are part of the program of instruction at the agency or institution; and

(5) Records that only contain information about an individual after he or she is no longer a student at that agency or institution.

*Eligible student* means a student who has reached 18 years of age or is attending an institution of postsecondary education.

*Institution of postsecondary education* means an institution that provides education to students beyond the secondary school level; "secondary school level" means the educational level (not beyond grade 12) at which secondary education is provided as determined under State law.



*Parent* means a parent of a student and includes a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or a guardian.

*Party* means an individual, agency, institution, or organization.

*Personally identifiable information* includes, but is not limited to:

(a) The student's name;

(b) The name of the student's parent or other family member;

(c) The address of the student or student's family;

(d) A personal identifier, such as the student's social security number or student number;

(e) A list of personal characteristics that would make the student's identity easily traceable; or

(f) Other information that would make the student's identity easily traceable.

*Record* means any information recorded in any way, including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche.

*Secretary* means the Secretary of the U.S. Department of Education or an official or employee of the Department of Education acting for the Secretary under a delegation of authority.

*Student,* except as otherwise specifically provided in this part, means any individual who is or has been in attendance at an educational agency or institution and regarding whom the agency or institution maintains education records.

**§ 99.4 What are the rights of parents?**

An educational agency or institution shall give full rights under the Act to either parent, unless the agency or institution

has been provided with evidence that there is a court order, State statute, or legally binding document relating to such matters as divorce, separation, or custody that specifically revokes these rights.

**§ 99.5 What are the rights of students?**

(a) When a student becomes an eligible student, the rights accorded to, and consent required of, parents under this part transfer from the parents to the student.

(b) The Act and this part do not prevent educational agencies or institutions from giving students rights in addition to those given to parents.

(c) An individual who is or has been a student at an educational institution and who applies for admission at another component of that institution does not have rights under this part with respect to records maintained by that other component, including records maintained in connection with the student's application for admission, unless the student is accepted and attends that other component of the institution.

**§ 99.6 [Reserved]**

**§ 99.7 What must an educational agency or institution include in its annual notification?**

(a)(1) Each educational agency or institution shall annually notify parents of students currently in attendance, or eligible students currently in attendance, of their rights under the Act and this part.

(2) The notice must inform parents or eligible students that they have the right to—

(i) Inspect and review the student's education records;

(ii) Seek amendment of the student's education records that the parent or eligible student believes to be inaccurate, misleading, or otherwise in violation of the student's privacy rights;



(iii) Consent to disclosures of personally identifiable information contained in the student's education records, except to the extent that the Act and § 99.31 authorize disclosure without consent; and

(iv) File with the Department a complaint under §§ 99.63 and 99.64 concerning alleged failures by the educational agency or institution to comply with the requirements of the Act and this part.

(3) The notice must include all of the following:

(i) The procedure for exercising the right to inspect and review education records.

(ii) The procedure for requesting amendment of records under § 99.20.

(iii) If the educational agency or institution has a policy of disclosing education records under § 99.31(a)(1), a specification of criteria for determining who constitutes a school official and what constitutes a legitimate educational interest.

(b) An educational agency or institution may provide this notice by any means that are reasonably likely to inform the parents or eligible students of their rights.

(1) An educational agency or institution shall effectively notify parents or eligible students who are disabled.

(2) An agency or institution of elementary or secondary education shall effectively notify parents who have a primary or home language other than English.

**§ 99.8 What provisions apply to records of a law enforcement unit?**

(a)(1) *Law enforcement unit* means any individual, office, department, division, or other component of an educational agency or institution, such as a unit of commissioned police officers or noncommissioned security guards, that is officially authorized or designated by that agency or institution to—

(i) Enforce any local, State, or Federal law, or refer to appropriate authorities a matter for enforcement of any local, State, or Federal law against any individual or organization other than the agency or institution itself; or

(ii) Maintain the physical security and safety of the agency or institution.

(2) A component of an educational agency or institution does not lose its status as a *law enforcement unit* if it also performs other, non-law enforcement functions for the agency or institution, including investigation of incidents or conduct that constitutes or leads to a disciplinary action or proceedings against the student.

(b)(1) Records of a law enforcement unit means those records, files, documents, and other materials that are—

(i) Created by a law enforcement unit;

(ii) Created for a law enforcement purpose; and

(iii) Maintained by the law enforcement unit.

(2) Records of a law enforcement unit does not mean—

(i) Records created by a law enforcement unit for a law enforcement purpose that are maintained by a component of the educational agency or institution other than the law enforcement unit; or

(ii) Records created and maintained by a law enforcement unit exclusively for a non-law enforcement purpose, such as a disciplinary action or proceeding conducted by the educational agency or institution.

(c)(1) Nothing in the Act prohibits an educational agency or institution from contacting its law enforcement unit, orally or in writing, for the purpose of asking that unit to investigate a possible violation of, or to enforce, any local, State, or Federal law.

(2) Education records, and personally identifiable information contained in education records, do not lose their



status as education records and remain subject to the Act, including the disclosure provisions of § 99.30, while in the possession of the law enforcement unit.

(d) The Act neither requires nor prohibits the disclosure by an educational agency or institution of its law enforcement unit records.

**Subpart B—What Are the Rights of Inspection and Review of Education Records?**

**§ 99.10 What rights exist for a parent or eligible student to inspect and review education records?**

(a) Except as limited under § 99.12, a parent or eligible student must be given the opportunity to inspect and review the student's education records. This provision applies to—

(1) Any educational agency or institution; and

(2) Any State educational agency (SEA) and its components.

(i) For the purposes of subpart B of this part, an SEA and its components constitute an educational agency or institution.

(ii) An SEA and its components are subject to subpart B of this part if the SEA maintains education records on students who are or have been in attendance at any school of an educational agency or institution subject to the Act and this part.

(b) The educational agency or institution, or SEA or its component, shall comply with a request for access to records within a reasonable period of time, but not more than 45 days after it has received the request.

(c) The educational agency or institution, or SEA or its component shall respond to reasonable requests for explanations and interpretations of the records.

(d) If circumstances effectively prevent the parent or eligible student from exercising the right to inspect and

review the student's education records, the educational agency or institution, or SEA or its component, shall—

(1) Provide the parent or eligible student with a copy of the records requested; or

(2) Make other arrangements for the parent or eligible student to inspect and review the requested records.

(e) The educational agency or institution, or SEA or its component shall not destroy any education records if there is an outstanding request to inspect and review the records under this section.

(f) While an education agency or institution is not required to give an eligible student access to treatment records under paragraph (b)(4) of the definition of *Education records* in § 99.3, the student may have those records reviewed by a physician or other appropriate professional of the student's choice.

**§ 99.11 May an educational agency or institution charge a fee for copies of education records?**

(a) Unless the imposition of a fee effectively prevents a parent or eligible student from exercising the right to inspect and review the student's education records, an educational agency or institution may charge a fee for a copy of an education record which is made for the parent or eligible student.

(b) An educational agency or institution may not charge a fee to search for or to retrieve the education records of a student.

**§ 99.12 What limitations exist on the right to inspect and review records?**

(a) If the education records of a student contain information on more than one student, the parent or eligible student may inspect and review or be informed of only the specific information about that student.



(b) A postsecondary institution does not have to permit a student to inspect and review education records that are:

(1) Financial records, including any information those records contain, of his or her parents;

(2) Confidential letters and confidential statements of recommendation placed in the education records of the student before January 1, 1975, as long as the statements are used only for the purposes for which they were specifically intended; and

(3) Confidential letters and confidential statements of recommendation placed in the student's education records after January 1, 1975, if:

(i) The student has waived his or her right to inspect and review those letters and statements; and

(ii) Those letters and statements are related to the student's:

(A) Admission to an educational institution;

(B) Application for employment; or

(C) Receipt of an honor or honorary recognition.

(c)(1) A waiver under paragraph (b)(3)(i) of this section is valid only if:

(i) The educational agency or institution does not require the waiver as a condition for admission to or receipt of a service or benefit from the agency or institution; and

(ii) The waiver is made in writing and signed by the student, regardless of age.

(2) If a student has waived his or her rights under paragraph (b)(3)(i) of this section, the educational institution shall:

(i) Give the student, on request, the names of the individuals who provided the letters and statements of recommendation; and

(ii) Use the letters and statements of recommendation only for the purpose for which they were intended.

(3)(i) A waiver under paragraph (b)(3)(i) of this section may be revoked with respect to any actions occurring after the revocation.

(ii) A revocation under paragraph (c)(3)(i) of this section must be in writing.

**Subpart C—What Are the Procedures for Amending Education Records?**

**§ 99.20 How can a parent or eligible student request amendment of the student's education records?**

(a) If a parent or eligible student believes the education records relating to the student contain information that is inaccurate, misleading, or in violation of the student's rights of privacy, he or she may ask the educational agency or institution to amend the record.

(b) The educational agency or institution shall decide whether to amend the record as requested within a reasonable time after the agency or institution receives the request.

(c) If the educational agency or institution decides not to amend the record as requested, it shall inform the parent or eligible student of its decision and of his or her right to a hearing under § 99.21.

**§ 99.21 Under what conditions does a parent or eligible student have the right to a hearing?**

(a) An educational agency or institution shall give a parent or eligible student, on request, an opportunity for a hearing to challenge the content of the student's education records on the grounds that the information contained in the



education records is inaccurate, misleading, or in violation of the privacy rights of the student.

(b)(1) If, as a result of the hearing, the educational agency or institution decides that the information is inaccurate, misleading, or otherwise in violation of the privacy rights of the student, it shall:

(i) Amend the record accordingly; and

(ii) Inform the parent or eligible student of the amendment in writing.

(2) If, as a result of the hearing, the educational agency or institution decides that the information in the education record is not inaccurate, misleading, or otherwise in violation of the privacy rights of the student, it shall inform the parent or eligible student of the right to place a statement in the record commenting on the contested information in the record or stating why he or she disagrees with the decision of the agency or institution, or both.

(c) If an educational agency or institution places a statement in the education records of a student under paragraph (b)(2) of this section, the agency or institution shall:

(1) Maintain the statement with the contested part of the record for as long as the record is maintained; and

(2) Disclose the statement whenever it discloses the portion of the record to which the statement relates.

**§ 99.22 What minimum requirements exist for the conduct of a hearing?**

The hearing required by § 99.21 must meet, at a minimum, the following requirements:

(a) The educational agency or institution shall hold the hearing within a reasonable time after it has received the request for the hearing from the parent or eligible student.

(b) The educational agency or institution shall give the parent or eligible student notice of the date, time, and place, reasonably in advance of the hearing.

(c) The hearing may be conducted by any individual, including an official of the educational agency or institution, who does not have a direct interest in the outcome of the hearing.

(d) The educational agency or institution shall give the parent or eligible student a full and fair opportunity to present evidence relevant to the issues raised under § 99.21. The parent or eligible student may, at their own expense, be assisted or represented by one or more individuals of his or her own choice, including an attorney.

(e) The educational agency or institution shall make its decision in writing within a reasonable period of time after the hearing.

(f) The decision must be based solely on the evidence presented at the hearing, and must include a summary of the evidence and the reasons for the decision.

**Subpart D—May an Educational Agency or Institution Disclose Personally Identifiable Information From Education Records?**

**§ 99.30 Under what conditions is prior consent required to disclose information?**

(a) The parent or eligible student shall provide a signed and dated written consent before an educational agency or institution discloses personally identifiable information from the student's education records, except as provided in § 99.31.

(b) The written consent must:

(1) Specify the records that may be disclosed;

(2) State the purpose of the disclosure; and



(3) Identify the party or class of parties to whom the disclosure may be made.

(c) When a disclosure is made under paragraph (a) of this section:

(1) If a parent or eligible student so requests, the educational agency or institution shall provide him or her with a copy of the records disclosed; and

(2) If the parent of a student who is not an eligible student so requests, the agency or institution shall provide the student with a copy of the records disclosed.

**§ 99.31 Under what conditions is prior consent not required to disclose information?**

(a) An educational agency or institution may disclose personally identifiable information from an education record of a student without the consent required by § 99.30 if the disclosure meets one or more of the following conditions:

(1) The disclosure is to other school officials, including teachers, within the agency or institution whom the agency or institution has determined to have legitimate educational interests.

(2) The disclosure is, subject to the requirements of § 99.34, to officials of another school, school system, or institution of postsecondary education where the student seeks or intends to enroll.

(3) The disclosure is, subject to the requirements of § 99.35, to authorized representatives of—

(i) The Comptroller General of the United States;

(ii) The Attorney General of the United States;

(iii) The Secretary; or

(iv) State and local educational authorities.

(4)(i) The disclosure is in connection with financial aid for which the student has applied or which the student has received, if the information is necessary for such purposes as to:

(A) Determine eligibility for the aid;

(B) Determine the amount of the aid;

(C) Determine the conditions for the aid; or

(D) Enforce the terms and conditions of the aid.

(ii) As used in paragraph (a)(4)(i) of this section, *financial aid* means a payment of funds provided to an individual (or a payment in kind of tangible or intangible property to the individual) that is conditioned on the individual's attendance at an educational agency or institution.

(5)(i) The disclosure is to State and local officials or authorities to whom this information is specifically—

(A) Allowed to be reported or disclosed pursuant to State statute adopted before November 19, 1974, if the allowed reporting or disclosure concerns the juvenile justice system and the system's ability to effectively serve the student whose records are released; or

(B) Allowed to be reported or disclosed pursuant to State statute adopted after November 19, 1974, subject to the requirements of § 99.38.

(ii) Paragraph (a)(5)(i) of this section does not prevent a State from further limiting the number or type of State or local officials to whom disclosures may be made under that paragraph.

(6)(i) The disclosure is to organizations conducting studies for, or on behalf of, educational agencies or institutions to:

(A) Develop, validate, or administer predictive tests;

(B) Administer student aid programs;



(C) Improve instruction.

(ii) The agency or institution may disclose information under paragraph (a)(6)(i) of this section only if:

(A) The study is conducted in a manner that does not permit personal identification of parents and students by individuals other than representatives of the organization; and

(B) The information is destroyed when no longer needed for the purposes for which the study was conducted.

(iii) If this Office determines that a third party outside the educational agency or institution to whom information is disclosed under this paragraph (a)(6) violates paragraph (a)(6)(ii)(B) of this section, the educational agency or institution may not allow that third party access to personally identifiable information from education records for at least five years.

(iv) For the purposes of paragraph (a)(6) of this section, the term *organization* includes, but is not limited to, Federal, State, and local agencies, and independent organizations.

(7) The disclosure is to accrediting organizations to carry out their accrediting functions.

(8) The disclosure is to parents, as defined in § 99.3, of a dependent student, as defined in section 152 of the Internal Revenue Code of 1986.

(9)(i) The disclosure is to comply with a judicial order or lawfully issued subpoena.

(ii) The educational agency or institution may disclose information under paragraph (a)(9)(i) of this section only if the agency or institution makes a reasonable effort to notify the parent or eligible student of the order or subpoena in advance of compliance, so that the parent or eligible student may seek protective action, unless the disclosure is in compliance with—

(A) A Federal grand jury subpoena and the court has ordered that the existence or the contents of the subpoena or the information furnished in response to the subpoena not be disclosed; or

(B) Any other subpoena issued for a law enforcement purpose and the court or other issuing agency has ordered that the existence or the contents of the subpoena or the information furnished in response to the subpoena not be disclosed.

(iii)(A) If an educational agency or institution initiates legal action against a parent or student, the educational agency or institution may disclose to the court, without a court order or subpoena, the education records of the student that are relevant for the educational agency or institution to proceed with the legal action as plaintiff.

(B) If a parent or eligible student initiates legal action against an educational agency or institution, the educational agency or institution may disclose to the court, without a court order or subpoena, the student's education records that are relevant for the educational agency or institution to defend itself.

(10) The disclosure is in connection with a health or safety emergency, under the conditions described in § 99.36.

(11) The disclosure is information the educational agency or institution has designated as "directory information", under the conditions described in § 99.37.

(12) The disclosure is to the parent of a student who is not an eligible student or to the student.

(13) The disclosure, subject to the requirements in § 99.39, is to a victim of an alleged perpetrator of a crime of violence or a non-forcible sex offense. The disclosure may only include the final results of the disciplinary proceeding conducted by the institution of postsecondary education with respect to that alleged crime or offense. The institution may disclose the final results of the disciplinary proceeding,



regardless of whether the institution concluded a violation was committed.

(14)(i) The disclosure, subject to the requirements in § 99.39, is in connection with a disciplinary proceeding at an institution of postsecondary education. The institution must not disclose the final results of the disciplinary proceeding unless it determines that—

(A) The student is an alleged perpetrator of a crime of violence or non-forcible sex offense; and

(B) With respect to the allegation made against him or her, the student has committed a violation of the institution's rules or policies.

(ii) The institution may not disclose the name of any other student, including a victim or witness, without the prior written consent of the other student.

(iii) This section applies only to disciplinary proceedings in which the final results were reached on or after October 7, 1998.

(15)(i) The disclosure is to a parent of a student at an institution of postsecondary education regarding the student's violation of any Federal, State, or local law, or of any rule or policy of the institution, governing the use or possession of alcohol or a controlled substance if—

(A) The institution determines that the student has committed a disciplinary violation with respect to that use or possession; and

(B) The student is under the age of 21 at the time of the disclosure to the parent.

(ii) Paragraph (a)(15) of this section does not supersede any provision of State law that prohibits an institution of postsecondary education from disclosing information.

(b) Paragraph (a) of this section does not forbid an educational agency or institution from disclosing, nor does it

require an educational agency or institution to disclose, personally identifiable information from the education records of a student to any parties under paragraphs (a)(1) through (11), (13), (14), and (15) of this section.

**§ 99.32 What recordkeeping requirements exist concerning requests and disclosures?**

(a)(1) An educational agency or institution shall maintain a record of each request for access to and each disclosure of personally identifiable information from the education records of each student.

(2) The agency or institution shall maintain the record with the education records of the student as long as the records are maintained.

(3) For each request or disclosure the record must include:

(i) The parties who have requested or received personally identifiable information from the education records; and

(ii) The legitimate interests the parties had in requesting or obtaining the information.

(b) If an educational agency or institution discloses personally identifiable information from an education record with the understanding authorized under § 99.33(b), the record of the disclosure required under this section must include:

(1) The names of the additional parties to which the receiving party may disclose the information on behalf of the educational agency or institution; and

(2) The legitimate interests under § 99.31 which each of the additional parties has in requesting or obtaining the information.

(c) The following parties may inspect the record relating to each student:

(1) The parent or eligible student.



(2) The school official or his or her assistants who are responsible for the custody of the records.

(3) Those parties authorized in § 99.31(a) (1) and (3) for the purposes of auditing the recordkeeping procedures of the educational agency or institution.

(d) Paragraph (a) of this section does not apply if the request was from, or the disclosure was to:

(1) The parent or eligible student;

(2) A school official under § 99.31(a)(l);

(3) A party with written consent from the parent or eligible student;

(4) A party seeking directory information; or

(5) A party seeking or receiving the records as directed by a Federal grand jury or other law enforcement subpoena and the issuing court or other issuing agency has ordered that the existence or the contents of the subpoena or the information furnished in response to the subpoena not be disclosed.

**§ 99.33 What limitations apply to the redisclosure of information?**

(a)(1) An educational agency or institution may disclose personally identifiable information from an education record only on the condition that the party to whom the information is disclosed will not disclose the information to any other party without the prior consent of the parent or eligible student.

(2) The officers, employees, and agents of a party that receives information under paragraph (a)(1) of this section may use the information, but only for the purposes for which the disclosure was made.

(b) Paragraph (a) of this section does not prevent an educational agency or institution from disclosing personally identifiable information with the understanding that the party receiving the information may make further disclosures of

the information on behalf of the educational agency or institution if:

(1) The disclosures meet the requirements of § 99.31; and

(2) The educational agency or institution has complied with the requirements of § 99.32(b).

(c) Paragraph (a) of this section does not apply to disclosures made to parents of dependent students under § 99.31(a)(8), to disclosures made pursuant to court orders, lawfully issued subpoenas, or litigation under § 99.31(a)(9), to disclosures of directory information under § 99.31(a)(11), to disclosures made to a parent or student under § 99.31(a)(12), to disclosures made in connection with a disciplinary proceeding under § 99.31(a)(14), or to disclosures made to parents under § 99.31(a)(15).

(d) Except for disclosures under § 99.31(a) (9), (11), and (12), an educational agency or institution shall inform a party to whom disclosure is made of the requirements of this section.

(e) If this Office determines that a third party improperly rediscloses personally identifiable information from education records in violation of § 99.33(a) of this section, the educational agency or institution may not allow that third party access to personally identifiable information from education records for at least five years.

**§ 99.34 What conditions apply to disclosure of information to other educational agencies or institutions?**

(a) An educational agency or institution that discloses an education record under § 99.31(a)(2) shall:

(1) Make a reasonable attempt to notify the parent or eligible student at the last known address of the parent or eligible student, unless:

(i) The disclosure is initiated by the parent or eligible student; or



(ii) The annual notification of the agency or institution under § 99.6 includes a notice that the agency or institution forwards education records to other agencies or institutions that have requested the records and in which the student seeks or intends to enroll;

(2) Give the parent or eligible student, upon request, a copy of the record that was disclosed; and

(3) Give the parent or eligible student, upon request, an opportunity for a hearing under subpart C.

(b) An educational agency or institution may disclose an education record of a student in attendance to another educational agency or institution if:

(1) The student is enrolled in or receives services from the other agency or institution; and

(2) The disclosure meets the requirements of paragraph (a) of this section.

**§ 99.35 What conditions apply to disclosure of information for Federal or State program purposes?**

(a) The officials listed in § 99.31(a)(3) may have access to education records in connection with an audit or evaluation of Federal or State supported education programs, or for the enforcement of or compliance with Federal legal requirements which relate to those programs.

(b) Information that is collected under paragraph (a) of this section must:

(1) Be protected in a manner that does not permit personal identification of individuals by anyone except the officials referred to in paragraph (a) of this section; and

(2) Be destroyed when no longer needed for the purposes listed in paragraph (a) of this section.

(c) Paragraph (b) of this section does not apply if:

(1) The parent or eligible student has given written consent for the disclosure under § 99.30; or

(2) The collection of personally identifiable information is specifically authorized by Federal law.

**§ 99.36 What conditions apply to disclosure of information in health and safety emergencies?**

(a) An educational agency or institution may disclose personally identifiable information from an education record to appropriate parties in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals.

(b) Nothing in this Act or this part shall prevent an educational agency or institution from—

(1) Including in the education records of a student appropriate information concerning disciplinary action taken against the student for conduct that posed a significant risk to the safety or well-being of that student, other students, or other members of the school community;

(2) Disclosing appropriate information maintained under paragraph (b)(1) of this section to teachers and school officials within the agency or institution who the agency or institution has determined have legitimate educational interests in the behavior of the student; or

(3) Disclosing appropriate information maintained under paragraph (b)(1) of this section to teachers and school officials in other schools who have been determined to have legitimate educational interests in the behavior of the student.

(c) Paragraphs (a) and (b) of this section will be strictly construed.

**§ 99.37 What conditions apply to disclosing directory information?**

(a) An educational agency or institution may disclose directory information if it has given public notice to parents



of students in attendance and eligible students in attendance at the agency or institution of:

(1) The types of personally identifiable information that the agency or institution has designated as directory information;

(2) A parent's or eligible student's right to refuse to let the agency or institution designate any or all of those types of information about the student as directory information; and

(3) The period of time within which a parent or eligible student has to notify the agency or institution in writing that he or she does not want any or all of those types of information about the student designated as directory information.

(b) An educational agency or institution may disclose directory information about former students without meeting the conditions in paragraph (a) of this section.

**§ 99.38 What conditions apply to disclosure of information as permitted by State statute adopted after November 19, 1974, concerning the juvenile justice system?**

(a) If reporting or disclosure allowed by State statute concerns the juvenile justice system and the system's ability to effectively serve, prior to adjudication, the student whose records are released, an educational agency or institution may disclose education records under § 99.31(a)(5)(i)(B).

(b) The officials and authorities to whom the records are disclosed shall certify in writing to the educational agency or institution that the information will not be disclosed to any other party, except as provided under State law, without the prior written consent of the parent of the student.

**§ 99.39 What definitions apply to the nonconsensual disclosure of records by postsecondary educational institutions in connection with disciplinary proceedings**

**concerning crimes of violence or non-forcible sex offenses?**

As used in this part:

*Alleged perpetrator of a crime of violence* is a student who is alleged to have committed acts that would, if proven, constitute any of the following offenses or attempts to commit the following offenses that are defined in appendix A to this part:

Arson

Assault offenses

Burglary

Criminal homicide—manslaughter by negligence

Criminal homicide—murder and nonnegligent manslaughter

Destruction/damage/vandalism of property

Kidnapping/abduction

Robbery

Forcible sex offenses.

*Alleged perpetrator of a nonforcible sex offense* means a student who is alleged to have committed acts that, if proven, would constitute statutory rape or incest. These offenses are defined in appendix A to this part.

*Final results* means a decision or determination, made by an honor court or council, committee, commission, or other entity authorized to resolve disciplinary matters within the institution. The disclosure of final results must include only the name of the student, the violation committed, and any sanction imposed by the institution against the student.

*Sanction imposed* means a description of the disciplinary action taken by the institution, the date of its imposition, and its duration.

*Violation committed* means the institutional rules or code sections that were violated and any essential findings



supporting the institution's conclusion that the violation was committed.

**Subpart E—What Are the Enforcement Procedures?**

**§ 99.60 What functions has the Secretary delegated to the Office and to the Office of Administrative Law Judges?**

(a) For the purposes of this subpart, *Office* means the Family Policy Compliance Office, U.S. Department of Education.

(b) The Secretary designates the Office to:

(1) Investigate, process, and review complaints and violations under the Act and this part; and

(2) Provide technical assistance to ensure compliance with the Act and this part.

(c) The Secretary designates the Office of Administrative Law Judges to act as the Review Board required under the Act to enforce the Act with respect to all applicable programs. The term *applicable program* is defined in section 400 of the General Education Provisions Act.

**§ 99.61 What responsibility does an educational agency or institution have concerning conflict with State or local laws?**

If an educational agency or institution determines that it cannot comply with the Act or this part due to a conflict with State or local law, it shall notify the Office within 45 days, giving the text and citation of the conflicting law.

**§ 99.62 What information must an educational agency or institution submit to the Office?**

The Office may require an educational agency or institution to submit reports containing information necessary to resolve complaints under the Act and the regulations in this part.

**§ 99.63 Where are complaints filed?**

A parent or eligible student may file a written complaint with the Office regarding an alleged violation under the Act and this part. The Office's address is: Family Policy Compliance Office, U.S. Department of Education, 400 Maryland Avenue, S.W., Washington, DC 20202–4605.

**§ 99.64 What is the complaint procedure?**

(a) A complaint filed under § 99.63 must contain specific allegations of fact giving reasonable cause to believe that a violation of the Act or this part has occurred.

(b) The Office investigates each timely complaint to determine whether the educational agency or institution has failed to comply with the provisions of the Act or this part.

(c) A timely complaint is defined as an allegation of a violation of the Act that is submitted to the Office within 180 days of the date of the alleged violation or of the date that the complainant knew or reasonably should have known of the alleged violation.

(d) The Office may extend the time limit in this section for good cause shown.

**§ 99.65 What is the content of the notice of complaint issued by the Office?**

(a) The Office notifies the complainant and the educational agency or institution in writing if it initiates an investigation of a complaint under § 99.64(b). The notice to the educational agency or institution—

(1) Includes the substance of the alleged violation; and

(2) Asks the agency or institution to submit a written response to the complaint.

(b) The Office notifies the complainant if it does not initiate an investigation of a complaint because the complaint fails to meet the requirements of § 99.64.



**§ 99.66 What are the responsibilities of the Office in the enforcement process?**

(a) The Office reviews the complaint and response and may permit the parties to submit further written or oral arguments or information.

(b) Following its investigation, the Office provides to the complainant and the educational agency or institution written notice of its findings and the basis for its findings.

(c) If the Office finds that the educational agency or institution has not complied with the Act or this part, the notice under paragraph (b) of this section:

(1) Includes a statement of the specific steps that the agency or institution must take to comply; and

(2) Provides a reasonable period of time, given all of the circumstances of the case, during which the educational agency or institution may comply voluntarily.

**§ 99.67 How does the Secretary enforce decisions?**

(a) If the educational agency or institution does not comply during the period of time set under § 99.66(c), the Secretary may, in accordance with part E of the General Education Provisions Act—

(1) Withhold further payments under any applicable program;

(2) Issue a compliant to compel compliance through a cease-and-desist order; or

(3) Terminate eligibility to receive funding under any applicable program.

(b) If, after an investigation under § 99.66, the Secretary finds that an educational agency or institution has complied voluntarily with the Act or this part, the Secretary provides the complainant and the agency or institution written notice of the decision and the basis for the decision.

## Selected Provisions of Chapter 180-75 of the Washington Administrative Code (1997)

## CHAPTER 180-75—PROFESSIONAL CERTIFICATION—GENERAL PROVISIONS

**WAC 180-75-003 Authority.** The authority for this chapter is RCW 28A.410.010 which authorizes the state board of education to establish, publish, and enforce rules and regulations determining eligibility for and certification of personnel employed in the common schools of this state. (Note: RCW 28A.195.010 (3)(a) requires most private school classroom teachers to hold appropriate Washington state certification with few exceptions.)

**WAC 180-75-005 Purpose.** The purpose of this chapter is to incorporate into one chapter the general certification requirements applicable to all permits and certificates.

**WAC 180-75-016 Equivalency of standards.** Reasonable flexibility in interpretation of the requirements contained in this chapter and in chapters 180-77, 180-78 and 180-79 WAC may be applied consistent with the intent and spirit of the requirements of the appropriate chapter. For example, advanced degrees in the same or related fields may be substituted for required lesser degrees. An annual report of the use of this rule shall be submitted to the state board of education by the superintendent of public instruction.

**WAC 180-75-017 Denial of recommendation for certification or endorsement by approved professional preparation training institutions.** Any person whose application for certification or for an endorsement is denied for recommendation to the superintendent of public instruction by an institution of higher education within the state with an approved professional preparation program, after exhausting any appeal procedures established by such institution, may apply directly to the superintendent of public instruction for such certificate or endorsement.



**WAC 180-75-045 Certificate validity.** Any certificate issued pursuant to chapters 180-77 or 180-79 WAC or previous standards of the state board of education shall entitle the holder thereof to be employed by a public or nonpublic school for the performance of duties encompassed by the type of certificate as specified in WAC 180-75-055, if such certification is required by statute or rules of the state board of education, unless such certificate is under suspension or until such certificate expires, lapses, or is revoked.

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**WAC 180-75-050 Certificate required.** Persons serving as teachers in public or private schools or as principals or educational staff associates in public schools and in vocational positions as established by chapter 180-77 WAC shall hold certificates authorized by the state board of education for service in the respective roles.

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**WAC 180-75-081 Good moral character and personal fitness—Definition.** As used in this chapter, the terms "good moral character and personal fitness" means character and personal fitness necessary to serve as a certificated employee in schools in the state of Washington, including character and personal fitness to have contact with, to teach, and to perform supervision of children. Good moral character and personal fitness includes, but is not limited to, the following:

(1) No conviction of any felony crime involving:

(a) The physical neglect of a child under chapter 9A.42 RCW;

(b) The physical injury or death of a child under chapter 9A.32 or 9A.36 RCW, excepting motor vehicle violations under chapter 46.61 RCW;

(c) The sexual exploitation of a child under chapter 9.68A RCW;

(d) Sexual offenses where a child is the victim under chapter 9A.44 RCW;

(e) The promotion of prostitution of a child under chapter 9A.88 RCW;

(f) The sale or purchase of a child under RCW 9A.64.030;

(g) *Provided*, That the general classes of felony crimes referenced within this subsection shall include equivalent federal and crimes in other states committed against a child;

(h) *Provided further*, That for the purpose of this subsection "child" means a minor as defined by the applicable state or federal law;

(i) *Provided further*, That for the purpose of this subsection "conviction" shall include a guilty plea.

(2) No conviction of any crime within the last ten years, including motor vehicle violations, which would materially and substantially impair the individual's worthiness and ability to serve as a professional within the public and private schools of the state. In determining whether a particular conviction would materially and substantially impair the individual's worthiness and ability to practice, the following and any other relevant considerations shall be weighed:

(a) Age and maturity at the time the criminal act was committed;

(b) The degree of culpability required for conviction of the crime and any mitigating factors, including motive for commission of the crime;

(c) The classification of the criminal act and the seriousness of the actual and potential harm to persons or property;

(d) Criminal history and the likelihood that criminal conduct will be repeated;

(e) The permissibility of service as a professional educator within the terms of any parole or probation;



(f) Proximity or remoteness in time of the criminal conviction;

(g) Any evidence offered which would support good moral character and personal fitness;

(h) If this subsection is applied to a person certified under the laws of the state of Washington in a suspension or revocation action, the effect on the education profession, including any chilling effect, shall be weighed; and

(i) In order to establish good moral character and personal fitness despite the criminal conviction, the applicant or certificate holder has the duty to provide available evidence relative to the above considerations. The superintendent of public instruction has the right to gather and present additional evidence which may corroborate or negate that provided by the applicant or certificate holder.

(3) No behavioral problem which endangers the educational welfare or personal safety of students, teachers, or other colleagues within the educational setting.

(4) No practice within the state of Washington within the previous five school years with an expired, lapsed, surrendered, or revoked certificate in a professional position for which certification is required under the rules of the state board of education.

**WAC 180-75-082 Good moral character and personal fitness—Necessary supporting evidence by applicants.** All applicants for certification shall submit the following:

(1) An affidavit from the applicant indicating that he or she has not been convicted of any crime or a complete disclosure of all arrests and subsequent dispositions of such arrests. In the event of a conviction for any arrest, the applicant shall state reasons why such conviction does not reflect adversely on the requirement to possess good moral character and be personally fit.

(2) An affidavit from the applicant that he or she has no history of serious behavioral problems or a complete disclosure of the nature and status of all such problems, including the names and addresses of health practitioners who have treated the applicant within the past ten years and an executed consent form permitting the superintendent of public instruction to contact and consult with such health practitioners and for such health practitioners to fully disclose medical information related to such behavioral problems.

(3) An affidavit from the dean of the college or school of education or one or more officials designated by such dean, or, if none, by the college or university president, where the applicant completed his or her approved preparation program, that indicates that a designated college or university official has contacted several faculty members who personally know or knew the applicant and has no knowledge that the applicant has been convicted of any crime and has no knowledge that the applicant has a history of any serious behavioral problems or a statement from such affiant of the reasons why it is not possible to make such an affidavit.

(4) Provided, that, if the affidavit described in subsection (3) of this section is impossible or impractical to obtain, the applicant shall submit to the superintendent of public instruction the following:

(a) A statement as to why it is impossible or impractical to secure the affidavit required by subsection (3) of this section;

(b) A complete employment history, including the names, addresses, and phone numbers of the immediate supervisor of such applicant when an employee; and

(c) The names, addresses, and phone numbers of three character references who are not related to the applicant.

(5) If the applicant holds or has held a professional certificate in any other state, such applicant shall prepare one of the following affidavits for each such state:



(a) An affidavit that such certificate has not been suspended, surrendered, or revoked. Such affidavit shall be forwarded to the licensing agency in such state with a request that such affidavit be verified and forwarded directly to the superintendent of public instruction.

(b) An affidavit which shall fully disclose the reasons for the suspension, surrender, or revocation of the certificate. Such affidavit shall be submitted directly to the superintendent of public instruction.

**WAC 180-75-083 Good moral character and personal fitness—Continuing requirement.** The good moral character and personal fitness requirement of applicants for certification under the laws of the state of Washington is a continuing requirement for holding a professional educational certificate under regulations of the state board of education.

**WAC 180-75-085 General requirements—Teachers, administrators, educational staff associates.** The following requirements are to be met by candidates for certification as teachers, administrators, or educational staff associates:

(1) Age. No person who is less than eighteen years of age shall receive a certificate to serve in the public or nonpublic schools of Washington state.

(2) Character. Applicants for certificates in Washington state who are not holders of a valid Washington state teacher's, administrator's, educational staff associate's, or vocational certificate must give evidence of good moral character and personal fitness as specified in WAC 180-75-082 and must complete a record check through the Washington state patrol criminal identification system and through the Federal Bureau of Investigation at the applicant's expense as required by RCW 28A.410.010; such record check shall include a fingerprint check using a Washington state patrol approved fingerprint card: *Provided*, That the superintendent of public instruction may waive the record

check for an applicant who has had a record check within the two years prior to application.

(3) Academic. A candidate for certification shall have successfully completed a state approved college/university professional preparation program and hold appropriate degrees, licenses, and additional course work as prescribed in chapter 180-79 WAC or have qualified under WAC 180-79-245: *Provided*, That this section shall not apply to vocational, limited, internship, or instructional specialists certificates.

**WAC 180-75-087 Reinstatement of certificates.** Only a continuing certificate may be reinstated. A holder of a lapsed, surrendered, or revoked continuing professional certificate at the time of application for reinstatement of such certificate must submit the following:

(1) Character evidence as required by WAC 180-75-085(2) for candidates for certification.

(2) In accordance with RCW 28A.410.110, a revoked certificate may not be reinstated within one calendar year from the date of revocation.

(3) *Provided*, That no certificate may be reinstated if more than five calendar years has passed since the date of lapsing, surrender, or revocation; however, such applicants may apply pursuant to WAC 180-75-061 for a new certificate under standards in effect at the time of application.

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